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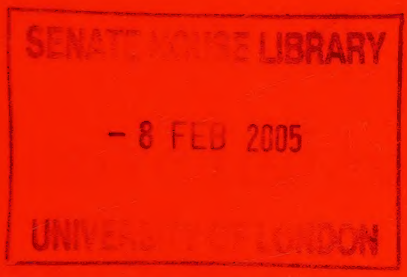

Cumulative Index
2001–2004
Including Recent Points

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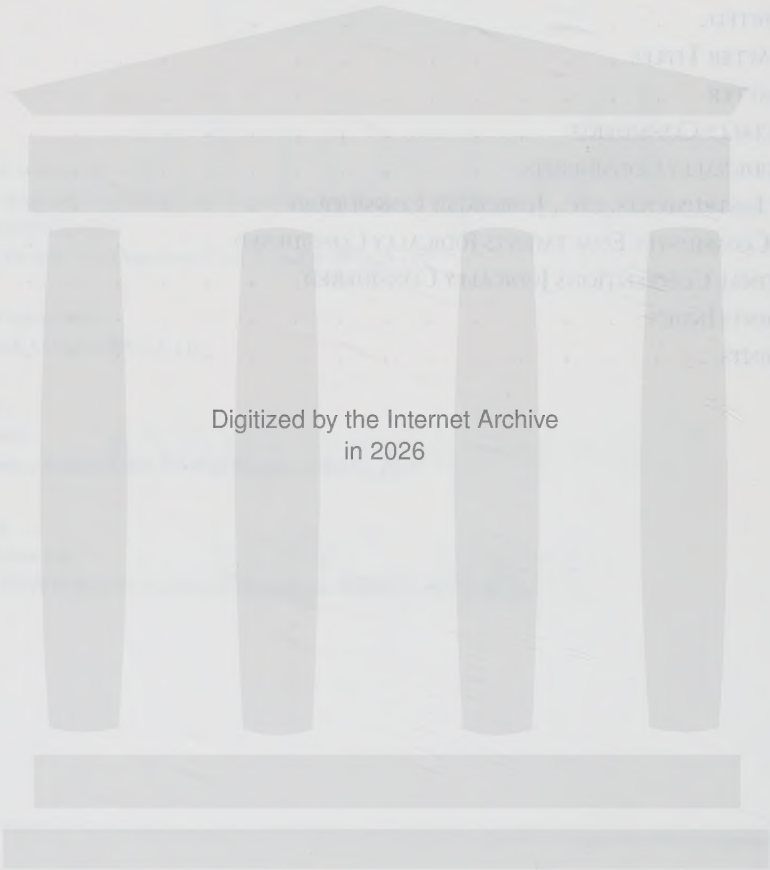

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Employee becoming unable to carry out manual duties owing to onset of disability — Employer retraining employee and shortlisting for all suitable sedentary posts — Employee failing to secure position — Whether duty to take "reasonable steps" requiring employer to dispense with need for competitive interviews — Local Government and Housing Act 1989, s 7 — Disability Discrimination Act 1995, ss 4(2), 5(1)(2)(5), 6 **Archibald v Fife Council,** HL(Sc) [2004] ICR 954

Employer refusing to consider employee's harassment complaint while disciplinary proceedings against her pending — Whether failure to make reasonable adjustment — Whether employers' ignorance of duty precluding justification — Disability Discrimination Act 1995, ss 5, 6 **Johnson & Johnson Medical Ltd v Filmer,** EAT [2002] ICR 292

Excluded classes
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Occupational health consultant recommending relocation of employee suffering from depression — Recommendation not acted on — Employee subsequently disciplined and dismissed — Whether failure to make reasonable adjustments — Whether justification in issue — Disability Discrimination Act 1995, ss 5(2), 6 **Prison Service v Beart,** CA [2003] ICR 1068

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Disability—*continued*
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Less favourable treatment: see also EDUCATION: **Teacher:** *Discrimination*
Employee suffering from chronic anxiety — Dismissed because of inability to work with new assistant — Whether discrimination for reason relating to disability — Whether provision of assistant "arrangement" made by employer — Need for tribunal to carry out analysis of employee's disability in work context — Disability Discrimination Act 1995, ss 5, 6
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Employee suffering from depressive illness — Dismissed for misconduct following disciplinary proceedings held in absence on sick leave — Tribunal finding failure to make reasonable adjustments in relation to disciplinary proceedings — Whether also less favourable treatment — Tribunal finding employers' reasons for dismissal unjustified but unrelated to disability — Whether inference of discrimination to be drawn — Disability Discrimination Act 1995, s 5(1) **Rowden v Dutton Gregory,** EAT [2002] ICR 971

Justification of treatment — Diabetic becoming insulin-dependent withdrawn from driving duties — Employer later revising policy and offering restricted driving duties — Whether open to employment tribunal to review employer's assessment of risk — Disability Discrimination Act 1995, s 5(3) **Post Office v Jones,** CA [2001] ICR 805

School
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Pupil suffering from autistic disorder excluded from school for bad behaviour — Whether proper comparator child neither disabled nor badly behaved — Disability Discrimination Act 1995, s 28B (as inserted by Special Educational Needs and Disability Act 2001, s 12)
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Employment
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Applicant refused entry to grade of specialist registrar on ground post held not meeting approval criteria of regulatory committee — Whether continuing discriminatory act — Separate complaints in different tribunals against same parties raising similar claims — Whether abuse of process — Refusal by specialist training authority to enter applicant on specialist register — Appeal panel of authority dismissing appeal — Whether act complained of that of authority or appeal panel — Whether jurisdiction in employment tribunal to hear complaint — Race Relations Act 1976, ss 12, 54(2), 68(7) — European Specialist Medical Qualifications Order 1995, art 12 (as amended by European Specialist Medical Qualifications Amendment Regulations 1997, para 2(4)) **Chaudhary v Royal College of Surgeons,** CA [2003] ICR 1510

Applicant seeking election to Scottish Parliament on job-share basis — Complaint of sex discrimination — Whether employment tribunal having jurisdiction — Sex Discrimination Act 1975, s 13(1) **Secretary of State for Scotland v Mann,** EAT(Sc) [2001] ICR 1005

Applicants suspended from standing for or representing Labour Party in local elections — Whether Labour Party "body" able to confer "authorisation" needed for "engagement in a particular profession" — Whether local councillor engaged in profession — Whether employment tribunal having jurisdiction to entertain complaint — Whether members of Labour Party "section of the public" — Race Relations Act 1976, ss 12, 20(1), 25
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Contract for services
Self-employed taxi driver paying weekly fee to operators for access to customers — Whether contract "personally to execute any work or labour" — Race Relations Act 1976, s 78(1)
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Employment—*continued*
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Illegality
Asylum-seeker obtaining employment in breach of condition of leave to remain — Whether illegality precluding race discrimination complaint against employer — Race Relations Act 1976, s 4(2)(b)(c) **Governing Body of Addey and Stanhope School v Vakante,** EAT [2003] ICR 290

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EMPLOYMENT: **Contract of employment:** *General practitioner*

Dismissed employee
Applicant complaining after dismissal of sexual harassment during employment — Employer rejecting complaint — Whether jurisdiction to hear complaint of discrimination in relation to employer's investigation of sexual harassment claim — Sex Discrimination Act 1975, s 6(2) — Council Directive 76/207/EEC, art 6 **Rhys-Harper v Relaxion Group plc,** CA [2001] ICR 1176
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Establishment in Great Britain
Military personnel stationed abroad complaining of acts of discrimination abroad — Whether working wholly outside Great Britain — Whether training course in Great Britain "work" — Whether one day's work in Great Britain de minimis — Sex Discrimination Act 1975, s 10(1) (as amended by Equal Opportunities (Employment Legislation) (Territorial Limits) Regulations 1999, reg 3(1)(2)) — Race Relations Act 1976, s 8(1) (as so amended)
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Former employee
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Complaint of victimisation on ground of sex — Applicant complaining termination of new employment due to unsolicited detrimental statement by former employer — Whether jurisdiction to consider complaint — Sex Discrimination Act 1975, s 6(2)
Metropolitan Police Service v Shoebridge, EAT [2004] ICR 1690

Liability of employers and principals
Police — Chief officer appointing investigating and supervisory officers in disciplinary proceedings — Police officers complaining of discrimination by such officers — Whether chief officer liable — Whether delay rendering employment tribunal decision unsafe — Sex Discrimination Act 1975, s 41(2) — Race Relations Act 1976, s 32(2) — Police (Discipline) Regulations 1985, reg 6 — Police (Conduct) Regulations 1999, reg 8
Yearwood v Comr of Police of the Metropolis, EAT [2004] ICR 1660

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Discriminatory act
Complaint of campaign of racial discrimination by superior detailed in originating application — Hearing limited to incidents within three months of originating application — No evidence given of acts referred to in originating application within period — Whether jurisdiction to consider evidence of acts not referred to in originating application — Race Relations Act 1976, s 54 **Ahuja v Inghams (Accountants),** CA [2002] ICR 1485

Onus of proof
Complaint of discrimination on grounds of race in relation to promotion — Piecemeal approach to evidence adopted by tribunal diminishing cumulative effect of primary facts — Whether decision flawed **Qureshi v Victoria University of Manchester (Note),** EAT [2001] ICR 863

Two equally qualified candidates for research post — Whether panel's choice affected by racial bias — Need to look for indicators apart from selection interview — Tribunal failing to record findings on relevant issues of fact — Whether decision flawed **Anya v University of Oxford,** CA [2001] ICR 847

DISCRIMINATION—*continued*

Race

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Gipsies booking council premises for wedding reception — Police providing inaccurate information about family to council — Council racially discriminating by imposing additional conditions on booking — Whether police knowingly aiding discrimination — Race Relations Act 1976, s 33(1) **Hallam v Avery,** HL(E) [2001] ICR 408

Assessors, role of

University student complaining of racial discrimination by supervisor — County court claim heard by judge and assessors — Whether assessors to assist judge in evaluating evidence — Whether having role in decision making process — Whether assessors' advice to be disclosed to parties prior to judgment — Whether to be recorded in judgment — Race Relations Act 1976, s 67(4) **Ahmed v Governing Body of the University of Oxford,** CA [2003] ICR 733

Student union officers expelled by university and excluded from premises — Student union treating employment contracts as ended — Whether university knowingly aiding dismissals — Race Relations Act 1976, s 33(1) **Anyanwu v South Bank Student Union (Commission for Racial Equality intervening),** HL(E) [2001] ICR 391

Employment

Applicant for employment

Trainee doctor seeking hospital placement under Secretary of State's scheme — Placements made by dean in consultation with specialist training committee — Appointed doctors employed by hospital trust — Employees of trust sitting on committee recommending applicant's placement at another hospital — Whether trust making "arrangements" for purpose of determining offer of employment — Whether trust refusing to offer employment — Race Relations Act 1976, ss 4(1), 13 (as substituted by Employment Act 1989, s 7(2)) **Hussain v King's College Hospital NHS Trust,** CA [2002] ICR 1433

Discriminatory act

Employee resigning following continuing racial abuse by foreman — Whether employer discriminating against employee by "dismissing" him — Whether "act extending over a period" — Award for injury to feelings — Injury varying in gravity at different times — Whether interest on award to run from start of discrimination — Race Relations Act 1976, ss 4(2)(c), 68(1)(7)(b) — Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996, reg 6(1)(a)(3) **Derby Fabrication Ltd v Burton,** EAT [2001] ICR 833

Harassment of employee

Applicant retaliating after racial attack by fellow employee on day out organised by employer — Whether "in the course of his employment" — Whether employer liable for attack by fellow employee — Employer's policy to dismiss employees using abusive language without regard to mitigating factors — Applicant dismissed under policy — Whether direct discrimination by employer — Race Relations Act 1976, ss 1(1)(a), 32(1) **Sidhu v Aerospace Composite Technology Ltd,** CA [2001] ICR 167

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Police

Constable complaining of racial abuse by fellow constables — Whether chief constable liable — Race Relations Act 1976, ss 16(1), 32(1), 75 **Chief Constable of Bedfordshire Police v Liversidge,** CA [2002] ICR 1135

Requirement or condition *see* **Sex:** *Employment:* Requirement or condition

Sex

Burden of proof

Burden on complainant to establish facts capable of constituting unlawful discrimination — Burden shifting to employer to prove treatment in no sense on ground of sex — Inferences to be drawn from employer's disregard of code of practice or questionnaire — Whether relevant to equal pay claim — Equal Pay Act 1970, s 1(3) (as substituted by Equal Pay (Amendment) Regulations 1983 (SI 1983/1794), reg 2(2)) — Sex Discrimination Act 1975 (as amended by Race Relations Act 1976, Sch 4, para 1 and Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001, ss 1(2), 56A(10), 63A, 74(2) **Barton v Investec Henderson Crosthwaite Securities Ltd,** EAT [2003] ICR 1205

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Sex—*continued*
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Burden on complainant to establish prima facie case of less favourable treatment on ground of sex — Burden to show treatment not on ground of sex shifting to respondent once prima facie case established — Sex Discrimination Act 1975, ss 1(1), 63A(2) (as substituted and inserted by Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001, regs 3, 5)
University of Huddersfield v Wolff, EAT [2004] ICR 828

Employee dismissed because of rumours of relationship with senior colleague — Tribunal finding employers failing to discharge burden of proving treatment "in no sense whatsoever" on ground of sex — Whether correct test — Sex Discrimination Act 1975, s 63A (as inserted by Sex Discrimination (Indirect Discrimination and Burden of Proof) Regulations 2001, reg 5)
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Genuine occupational qualification
Transsexual rejected for appointment as police constable on ground of inability to carry out personal searches — Whether exception applicable — Whether constable "liable to be called upon to perform" intimate searches — Whether supplementary genuine occupational qualification — Sex Discrimination Act 1975, ss 7, 7B(2)(a) (as inserted by Sex Discrimination (Gender Reassignment) Regulations 1999, reg 4(1)) — Police and Criminal Evidence Act 1984, s 54(9)
Chief Constable of the West Yorkshire Police v A (No 2), EAT [2002] ICR 552
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Applicant discharged from armed forces on ground of homosexuality — Complaint of discrimination on ground of sex — Whether "sex" including sexual orientation — Appropriate comparator — Sex Discrimination Act 1975, ss 1(1)(a), 5(3) — Human Rights Act 1998, s 3, Sch 1, Pt I, art 14 **Macdonald v Ministry of Defence**,
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Employee undergoing gender reassignment to female sex seeking use of female toilet — Employer arranging use of toilet for disabled persons while applicant at pre-operative stage — Whether unlawful discrimination — Allegation of harassment by fellow employees — Whether employer liable — Sex Discrimination Act 1975, ss 2A, 41(3), 82 (as inserted and amended by Sex Discrimination (Gender Reassignment) Regulations 1999, reg 2(1)(3))
Croft v Royal Mail Group plc (formerly Consignia plc), CA [2003] ICR 1425

Female chief inspector stopped from doing staff appraisals following complaints — Male chief inspectors retaining function — Whether valid comparators — Whether "detriment" — Approach to question of less favourable treatment on ground of sex — Sex Discrimination (Northern Ireland) Order 1976, arts 3(1)(a), 7, 8(2)(b)
Shamoon v Chief Constable of the Royal Ulster Constabulary, HL(NI) [2003] ICR 337

Gender reassignment treatment affecting applicant's work performance — Dismissal for capability — Whether less favourable treatment — Gender identity dysphoria — Whether affecting day-to-day activities — Whether disability — Sex Discrimination Act 1975, s 1(1) — Disability Discrimination Act 1995, s 1(1)
Ashton v Chief Constable of West Mercia Constabulary, EAT [2001] ICR 67

Lesbian teacher complaining of pupils' gender-specific abuse — No evidence hypothetical homosexual male would have been treated differently — Whether sex discrimination — Sex Discrimination Act 1975, ss 1(1), 5(3) — Human Rights Act 1998, s 3(1)
Pearce v Governing Body of Mayfield Secondary School, CA [2002] ICR 198
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Sex—*continued*
Employment—continued
Police
Constable complaining of less favourable treatment and victimisation in decisions by superiors as to postings — Whether "act done by" chief officer — Whether chief officer liable for discrimination — Sex Discrimination Act 1975, s 17(1)
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Constable complaining of sex discrimination by fellow officers — Whether chief constable liable — Sex Discrimination Act 1975, ss 17(1), 41(2) — Council Directive 76/207/EEC, art 1(1) **Chief Constable of Kent County Constabulary v Baskerville**, CA [2003] ICR 1463

Pregnancy
Employee recruited for fixed period failing to inform employer of pregnancy — Dismissal during term of contract when employer informed of pregnancy — Whether contrary to Community law — Whether non-renewal of fixed-term contract dismissal — Whether contrary to Community law in case of pregnant employee — Council Directive 76/207/EEC, arts 2(1), 3(1), 5(1) — Council Directive 92/85/EEC, art 10
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Vacancy for work in operating theatre for indefinite period — Pregnant woman rejected on ground of national law prohibiting employment of pregnant women in potentially dangerous work — Whether unlawful discrimination — Council Directive 76/207/EEC, art 2
Mahlburg v Land Mecklenburg-Vorpommern (Case C-207/98), ECJ [2001] ICR 1032

Requirement or condition
College requiring predominantly female part-time lecturers on fixed-term contracts to be re-engaged as sub-contractors through agency — Applicant losing income and benefits associated with employment — Proper approach to evaluating justification for condition against discriminatory effect on women — Whether discrimination against applicant as contract worker — Whether lecturer employed by college appropriate comparator in equal pay claim — Equal Pay Act 1970, s 1(6) (as amended by Sex Discrimination Act 1975, s 8(6), Sch 1) — Sex Discrimination Act 1975, ss 1(1)(b), 9(2) — EC Treaty, art 141
Allonby v Accrington and Rossendale College, CA [2001] ICR 1189

Employee over 65 at time of dismissal — Application for redundancy payment and complaint of unfair dismissal precluded by domestic legislation — Whether legislation discriminating against men — Onus to show objectively justified — Employment Rights Act 1996, ss 109(1), 156(1) — EC Treaty, art 141 **Harvest Town Circle Ltd v Rutherford**, EAT [2002] ICR 123

Employee working under series of fixed term contracts — Employers' need for redundancies — Policy of non renewal of fixed term contracts before applying redundancy selection procedure — Whether indirect discrimination — Whether requirement shown to be justified — Sex Discrimination Act 1975, s 1(1)(b) **Whiffen v Milham Ford Girls' School**, CA [2001] ICR 1023

Equally qualified man and woman applying for promotion — Priority given to woman where under-represented unless balance tilted in favour of man by reasons specific to him — Whether contrary to equal treatment principle — Whether within exception for measures to promote equal opportunity — Council Directive 76/207/EEC) art 2(1)(4)
Marschall v Land Nordrhein-Westfalen (Case C-409/95), ECJ [2001] ICR 45

Lord Chancellor appointing special adviser — Post not advertised and applications not sought — Whether indirect discrimination — Sex Discrimination Act 1975, s 1(1)(a) — Race Relations Act 1976, s 1(1)(b) **Lord Chancellor v Coker**, EAT [2001] ICR 507
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Positive discrimination in favour of under-represented sex — Candidate belonging to under-represented sex to be selected for post unless breach of requirement of objectivity — Whether contrary to Community law — EC Treaty, art 141 EC — Council Directive 76/207/EEC, art 2(1)(4) **Abrahamsson v Fogelqvist (Case C-407/98)**, ECJ [2002] ICR 932

Treatment on ground of applicant's homosexuality — Complaint of discrimination on ground of sex — Whether sex including sexual orientation — Appropriate comparator — Sex Discrimination Act 1975, ss 1(1)(a), 5(3)
Macdonald v Ministry of Defence, HL(Sc) [2003] ICR 937
Pearce v Governing Body of Mayfield Secondary School, HL(E) [2003] ICR 937

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Sex—*continued*
Equal pay see also *Burden of proof*
Employment: Requirement or condition
Comparison of pay
Midwives receiving lower basic monthly salary than clinical technicians — Inconvenient hours supplement paid to midwives but not technicians — Midwives working fewer weekly hours than technicians — Whether pay comparison to take account of supplement and reduced hours — EC Treaty, art 119 — Council Directive 75/117/EEC
Jämställdhetsombudsmannen v Örebro Läns Landsting (Case C-236/98), ECJ [2001] ICR 249

Maternity leave
Lump sum payment to employees on maternity leave to compensate for occupational disadvantages of maternity leave — Whether payment to female employees only discriminatory — EC Treaty, art 119
Abdoulaye v Régie Nationale des Usines Renault SA (Case C-218/98), ECJ [2001] ICR 527

Pension scheme
Female nurses retiring at 55 entitled to pension calculated on full pensionable service — Calculation of male nurses' pensions restricted to service after May 1990 — Whether restriction discriminatory — National Health Service Pension Scheme Regulations 1995, reg R2(4) — EC Treaty, art 119 **Quirk v Burton Hospitals NHS Trust**, EAT [2001] ICR 415
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Part-time employees' retrospective claims — Part-time employees excluded from or having option to join scheme compulsory for full-time employees — Whether breach of equality clause — Effect of failure to inform part-time employees of removal of barrier to membership — When series of contracts ceasing to be stable employment relationship — Effect of transfer of undertaking on time for bringing claim — Equal Pay Act 1970, ss 1(1)(2) (as substituted by Sex Discrimination Act 1975, s 8(6), Sch 1, Pt I, para 2 and modified by Occupational Pension Schemes (Equal Access to Membership) Regulations 1976, reg 12(1)), 2(4) — Transfer of Undertakings (Protection of Employment) Regulations 1981, regs 5, 7
Preston v Wolverhampton Healthcare NHS Trust (No 3), EAT [2004] ICR 993

Part-time employees' retrospective claims time-barred and restricted by national legislation — Whether legislation compatible with Community law — Successive contracts of employment with same employer within stable employment relationship — Whether six-month limitation period running from end of last contract — Equal Pay Act 1970, s 2(4)(5) (as amended by Sex Discrimination Act 1975, s 8(6), Sch 1, Pt 1, para 2) — Occupational Pension Schemes (Equal Access to Membership) Regulations 1976, reg 12(1)(b) — EC Treaty, art 119 **Preston v Wolverhampton Healthcare NHS Trust (No 2)**, HL(E) [2001] ICR 217

Pension scheme providing for surviving spouse — Female member with partner male by gender reassignment — National legislation precluding marriage — Partner not entitled to widower's pension under scheme — Whether contrary to Community equal pay principle — EC Treaty, art 141 EC — Convention for the Protection of Human Rights and Fundamental Freedoms, art 12 **KB v National Health Service Pensions Agency (Case C-117/01)**, ECJ [2004] ICR 781

Same employment
Applicants performing work of equal value to workers of different sex employed by previous employer — Whether those workers relevant comparators on claim for equality of pay — Whether applicants able to rely on Community equal pay provision — EC Treaty, art 141(1) EC **Lawrence v Regent Office Care Ltd (Case C-320/00)**, ECJ [2003] ICR 1092

Head teacher employed by education authority — Pay scales settled by statutory committee for entire public sector in Scotland — Whether head teacher employed by different education authority relevant comparator — Equal Pay Act 1970, s 1(6) (as amended by Sex Discrimination Act 1975, s 8(1), Sch 1) — EC Treaty, art 141 EC
South Ayrshire Council v Morton, Ct of Sess [2002] ICR 956

Male civil servants seeking equality of pay with female employees in different government department — Whether in "same employment" — Whether female employees relevant comparators — Whether job evaluation study rating comparator's work as equivalent — Equal Pay Act 1970, s 1 (as substituted by Sex Discrimination Act 1975, s 8(1)(6), Sch 1, Pt 1) — EC Treaty, art 141(1) EC
Department for Environment Food and Rural Affairs v Robertson, EAT [2004] ICR 1289

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Sex—*continued*
Equal pay—continued
Same employment—*continued*
Woman employed by college dismissed and re-engaged as self-employed through agency on less favourable terms — Claim to equal pay with male employee at college and to access to teachers' pension — Pension only available to employed persons under statutory rules — Whether college employee relevant comparator — Whether comparator necessary for pension claim based on statutory discrimination — Whether statutory pension condition defeasible by evidence of indirect discrimination — Whether self-employed person "worker" for purposes of Community equal pay provision — EC Treaty, art 141 EC
Allonby v Accrington and Rossendale College (Case C-256/01), ECJ [2004] ICR 1328

Time limit
Employee working in different departments during employment — Claim for equality of pay with comparators in department employee not working in during last six months of employment — Whether employee "employed in the employment" during final six months — Equal Pay Act 1970, s 2(4) (as amended by Sex Discrimination Act 1975, s 8(6), Sch 1, Pt I)
Young v National Power plc, CA [2001] ICR 328

Variation due to material difference
Applicant paid less than female employed on like work — Difference not due to sex discrimination — Whether onus on employer objectively to justify difference in pay — Equal Pay Act 1970, s 1(3) (as substituted by Equal Pay (Amendment) Regulations 1983, reg 2(2))
Parliamentary Comr for Admininstration and the Health Service Comrs v Fernandez, EAT [2004] ICR 123

Applicant paid less than male comparators — Length of service reason for differential — Reason having disparate impact on women — Whether employer having to show objective justification for use of length of service — Equal Pay Act 1970, s 1(3) (as substituted by Equal Pay (Amendment) Regulations 1983, reg 2(2))
Health and Safety Executive v Cadman, EAT [2004] ICR 378

Comparator's pay protected following transfer of undertaking — Applicant producing statistics based on pool of 8 to show smaller percentage of women than men entitled to such protection — Whether any onus on employer to prove absence of sex discrimination — Equal Pay Act 1970, s 1(3) (as substituted by Equal Pay (Amendment) Regulations 1983, reg 2(2))
Nelson v Carillon Services Ltd, CA [2003] ICR 1256

Time limit
Extension of time
Complaint brought more than three months after act of discrimination — Complainant awaiting outcome of internal grievance procedure — Whether sufficient ground for extending time — Whether complainant estopped from pursuing late claims which could have been brought in earlier proceedings — Race Relations Act 1976, s 68(6)
Apelogun-Gabriels v Lambeth London Borough Council, CA [2002] ICR 713

Complaint presented nine years after act complained of — Employee suspecting discrimination in relation to appointment when inspecting file in connection with complaint of subsequent discrimination — Whether just and equitable to extend time — Race Relations Act 1976, s 68
Southwark London Borough Council v Afolabi, CA [2003] ICR 800

Time when act committed
Police constable complaining of failure to deal with numerous acts of discrimination by fellow officers over 11 years — Complaint presented after constable absent on sick leave for one year — Whether ongoing discriminatory treatment of ethnic policewomen "act extending over a period" — Sex Discrimination Act 1975, s 76(6)(b) — Race Relations Act 1976, s 68(7)(b)
Comr of Police of the Metropolis v Hendricks, CA [2003] ICR 530

Victimisation
Race
Employer's policy to allow employees short leave of absence without inquiry — Employee seeking time off to consult adviser prior to hearing of race complaint against employer — Time off refused — Employee dismissed for taking time off without permission — Whether less favourable treatment — Race Relations Act 1976, s 2(1)(a)
Brown v TNT Express Worldwide (UK) Ltd, CA [2001] ICR 182

EDUCATION

Teacher

Disciplinary proceedings

Allegation of inappropriate conduct towards pupil — Disciplinary panel of governors deliberating in private after hearing evidence — Whether chief education officer entitled to attend panel's deliberations — Whether officer's exclusion invalidating panel's finding — Whether appropriate for chief education officer to tender advice to panel in teacher's absence — Education Reform Act 1988, Sch 3, para 8(1)(9) — Education Act 1996, ss 496, 497

R (McNally) v Secretary of State for Education and Employment, CA [2002] ICR 15

Discrimination

Teacher with congenital heart disorder having child by surrogate — Paid post-natal leave refused on financial grounds — Complaint of disability discrimination — Whether governing body or local education authority correct respondent — Whether refusal less favourable treatment for reason related to disability — Disability Discrimination Act 1995, s 5(1)(2) — Whether treatment justified — School Standards and Framework Act 1998, Sch 16, para 22 — Education (Modification of Enactments Relating to Employment) Order 1999, arts 2(2), 6

Murphy v Slough Borough Council, EAT [2004] ICR 1163

Dismissal

Teacher claiming constructively dismissed — Whether governing body and/or local education authority correct respondents to complaint of unfair dismissal — School Standards and Framework Act 1998, Sch 16, para 25 — Education (Modification of Enactments Relating to Employment) Order 1999, arts 2(2), 3(1), 6

Green v Governing Body of Victoria Road Primary School, EAT [2003] ICR 713
CA [2004] ICR 684

EMPLOYMENT

Breach of contract

Termination agreement

Agreement concluded after termination of employment — Whether employment tribunal having jurisdiction — Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, art 3

Miller Bros & F P Butler Ltd v Johnston, EAT [2002] ICR 744

Contract of employment

Agency worker

Applicant supplied by agency working for five years at local authority hostel — Whether employed by agency — Whether circumstances giving rise to implied contract of service between applicant and local authority

Dacas v Brook Street Bureau (UK) Ltd, CA [2004] ICR 1437

Applicant working for 5 years for client of employment agency — Whether contract of employment with client to be implied — Whether applicant "employee" — Employment Rights Act 1996, s 230(1)

Franks v Reuters Ltd, CA [2003] ICR 1166

Applicant working part-time on one long-term assignment — Assignment terminated after $2\frac{1}{2}$ years — Complaint of unfair dismissal — Whether applicant "employee" of agency

Montgomery v Johnson Underwood Ltd, CA [2001] ICR 819

Worker supplied by agency to company — Whether contract of service with company — Subsequent permanent employment with company — Whether worker able to rely on supply period to establish requisite period of employment for unfair dismissal complaint

Stephenson v Delphi Diesel Systems Ltd, EAT [2003] ICR 471

Apprentice

Apprentice engaged under standard form "modern apprenticeship pact" — Employer agreeing to employ and apprentice agreeing to comply with employer's terms and conditions of employment "for the duration of the training plan" — Whether agreement terminable by notice in accordance with employer's terms and conditions before completion of training

Whitely v Marton Electrical Ltd, EAT [2003] ICR 495

Modern apprenticeship agreement — Whether contract of employment

Thorpe v Dul, EAT [2003] ICR 1556

Collective agreement

Employers negotiating revised terms with union — No ballot of employees — Union informing employers majority of 1,500 employees consenting to revised terms — Petition objecting to new terms by 130 employees continuing to work under protest — Proceedings issued by 61 employees two years later — Whether bound by agreement

Henry v London General Transport Services Ltd, CA [2002] ICR 910

EMPLOYMENT—*continued*
Contract of employment—*continued*
Company director
Controlling shareholder having service contract with company — Whether "employee" for purpose of unfair dismissal claim — Employment Rights Act 1996, s 230(1)
Connolly v Sellers Arenascene Ltd, CA [2001] ICR 760

Disciplinary proceedings
Different procedures for personal and professional conduct — Whether for employer to decide category of conduct — Whether reasonableness of decision relevant
Saeed v Royal Wolverhampton Hospitals NHS Trust, CA [2001] ICR 903

Employer local authority — Disciplinary proceedings against employees concerning death of child — Statutory inquiry into death pending — Employer refusing to adjourn proceedings until after inquiry — Whether refusal susceptible to judicial review — Risk of proceedings affecting employees' health and preventing participation in inquiry — Whether employer in breach of implied duty of trust and confidence — Whether disciplinary proceedings to be adjourned
R (Arthurworrey) v Haringey London Borough Council, Jackson J [2002] ICR 279

Medical practitioner deliberately misleading patient as to problems occurring during operation — Whether personal or professional conduct — Professional conduct to be dealt with by external panel with medical expertise — Practitioner dismissed following internal disciplinary and appeal proceedings — Whether appropriate procedure
Skidmore v Dartford and Gravesham NHS Trust,
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Practitioner providing services to health authority — Terms of service governed by statutory regulations — Whether "employee" for purpose of unfair dismissal claim — Whether in "employment" or "contract worker" for purpose of race discrimination claim — Race Relations Act 1976, ss 7, 78 — Employment Rights Act 1996, s 230(1)
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Payments of sales commission made so as to minimise tax — Complaint of unfair dismissal and claim for payment of commission — Whether burden on employer of establishing contract tainted with illegality — Whether contract enforceable
Colen v Cebrian (UK) Ltd, CA [2004] ICR 568

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Employee alleging campaign by employer to demoralise before dismissing — Compensation awarded for unfair dismissal — Subsequent claim for damages for stress-related illness caused by employer's conduct prior to dismissal — Whether claim sustainable
Eastwood v Magnox Electric plc (Note), CA [2003] ICR 520

Employee prior to dismissal subjected to conduct by employer in breach of duty to act fairly — Compensation awarded for unfair dismissal — Subsequent claim for damages in relation to illness caused by employer's conduct prior to dismissal — Whether claim sustainable
Eastwood v Magnox Electric plc, HL(E) [2004] ICR 1064
McCabe v Cornwall County Council, HL(E) [2004] ICR 1064

Employee suspended for three years before dismissal — Compensation awarded for unfair dismissal — Subsequent claim for damages for psychiatric injury caused by suspension — Whether claim to be struck out
McCabe v Cornwall County Council, CA [2003] ICR 501

Employer in liquidation reputed to have acted fraudulently — Redundant employees proving in liquidation for compensation for loss of employment prospects — Whether employer's breach of implied obligation of good faith cause of employees' failure to obtain further employment — Whether employees entitled to stigma damages
Bank of Credit and Commerce International SA v Ali (No 2), CA [2002] ICR 1258

Employer intending to dismiss employee by reason of redundancy — Employer dismissing employee for other reason — Employee thereby deprived of contractual redundancy benefits — Whether implied term prohibiting dismissal for any reason other than redundancy
Jenvey v Australian Broadcasting Corpn, Elias J [2003] ICR 79

Employer offering enhanced redundancy scheme for incorporation in contracts of permanent employees — Applicant not granted offer in mistaken belief temporary employee — Whether breach of implied term of trust and confidence
Transco plc v O'Brien, CA [2002] ICR 721

EMPLOYMENT—*continued*
Contract of employment—*continued*
Implied term—continued
Redundant employees entering into agreement settling all claims arising from employment — Employer subsequently found to have conducted business illegally and dishonestly — Employees claiming stigma damages for breach of implied term of trust and confidence and misrepresentation — Whether claims barred by agreement
Bank of Credit and Commerce International SA v Ali, HL(E) [2001] ICR 337

Senior manager on high earnings — Campaign of bullying and intimidation by chief executive using foul and abusive language — Whether employer in breach of implied term of trust and confidence **Horkulak v Cantor Fitzgerald International,** Newman J [2004] ICR 697

Office holder
Registrar of births, marriages and deaths — Office of registrar held during pleasure of Registrar General — Registrar appointed and paid by local authority — Whether employee of local authority — Registration Service Act 1953, s 6(4) — Employment Rights Act 1996, s 230(1)
Lincolnshire County Council v Hopper, EAT [2002] ICR 1301

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Employee granted share options under company scheme — Directors' absolute discretion to determine appropriate proportion employee permitted to exercise — Employee on dismissal not permitted to exercise any options — Whether discretion exercised reasonably
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Sick pay benefit scheme
Employer's scheme providing benefit as long as employee "unable to work" — Insurers under supporting insurance policy discontinuing cover when satisfied employee not disabled from every employment activity — Whether entitlement to benefit independent of insurance — Whether employee "unable to work" **Jowitt v Pioneer Technology (UK) Ltd,** CA [2003] ICR 1120

Statutory restriction
Local authority employee — Contractual entitlement to gratuity on retirement — Whether term on which employee "holds office" — Subsequent legislation restricting maximum retirement gratuity payable by local authority — Whether contractual term rendered unenforceable — Local Government Act 1972, s 112(2) — Local Government (Discretionary Payments) Regulations 1996, reg 41(3) **Nicholls v Greenwich London Borough Council,** CA [2003] ICR 1020

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Agreement extending employment on redundancy to enable employee to claim enhanced pension benefits — Agreement ultra vires local authority employer — Whether irrational and unlawful to award enhanced benefits — Local Government (Early Termination of Employment) (Discretionary Compensation) (England and Wales) Regulations 2000, reg 8
R (Foster) v Eastbourne Borough Council, CA [2004] ICR 1149

Contract terminable on six months' notice giving employer option to make payment in lieu — Employee summarily dismissed without cause or payment in lieu — Whether entitled to six months' salary in lieu — Whether earnings during notice period to be deducted from award
Cerberus Software Ltd v Rowley, CA [2001] ICR 376

Disappearance of employee's position — Agreement for employee to continue working for employer on different basis for further year — Agreement subsequently found to be ultra vires employer — Whether employment relationship continuing — Date of termination
Eastbourne Borough Council v Foster, CA [2002] ICR 234

Employee accepting early retirement as effective from earlier date — Whether agreed date "effective date of termination" — Employment Rights Act 1996, ss 97(1)(b), 203(1)
Fitzgerald v University of Kent at Canterbury, CA [2004] ICR 737

EMPLOYMENT—*continued*

Contract of employment—*continued*

Termination—*continued*

Employee not returning to work after demotion — Employer stating failure to return by stated date to be taken as resignation — Whether dismissal with notice — Employee presenting unfair dismissal complaint prior to stated date — Whether complaint in time — Employee claiming repudiatory conduct by employer — Whether acceptance by employee by conduct or by presentation of complaint — Employment Rights Act 1996, s 111(3)
Rai v Somerfield Stores Ltd, EAT [2004] ICR 656

Employee's contract terminated after protracted unpaid sick leave — Claim for statutory entitlement to pay during notice period — Contractual notice period one week more than statutory minimum — Whether constituting failure to give statutory notice — Whether claim precluded — Employment Rights Act 1996, ss 86(1), 87(1)(4), 88(1), 91(5)
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Teacher applying for ill-health retirement benefit on ground of permanent incapacity — Whether contract terminating by teacher's resignation on receipt of benefit — Whether employer required to serve notice of dismissal **Healey v Bridgend County Borough Council (Note),** CA [2004] ICR 561

Teacher applying for ill-health retirement benefit on ground of permanent incapacity — Whether contract terminating on acceptance of benefit — Whether employers required to serve notice of dismissal — Education (Teachers' Qualifications and Health Standards) (England) Regulations 1999, reg 7(1) **R (Verner) v Derby City Council,** Lindsay J [2004] ICR 535

Teacher incapable of work due to ill health — Whether contract automatically terminated by incapacity — Education (Teachers' Qualifications and Health Standards) (England) Regulations 1999, reg 7 **R (Dorling) v Sheffield City Council,** Goldring J [2003] ICR 424

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Employer's insolvency

Debt due to employee

Employee contractually entitled to specified hourly rate in case of lay-off — Application to Secretary of State for payment — Secretary of State paying lesser amount of statutory guarantee payment — Whether contractual payment "arrears of pay" — Employment Rights Act 1996, ss 28, 182, 184(1)(2) **Benson v Secretary of State for Trade and Industry,** EAT [2003] ICR 1082

Employees owed protective award — Application to Secretary of State for payment — Statutory limit imposed before deductions made — Whether correct method of calculation — Employment Rights Act 1996, s 186(1) — Council Directive 80/987/EEC, art 4(3)
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Maternity rights

Return to work

Applicant unable to return on agreed date of return owing to pregnancy-related illness — Employers refusing to allow applicant to return at later date — Whether unfair dismissal — Whether sex discrimination — Sex Discrimination Act 1975, s 6(2) — Employment Protection (Consolidation) Act 1978, ss 42(1) (as substituted by Trade Union Reform and Employment Rights Act 1993, s 23(1)(b), Sch 2), 56 **Halfpenny v IGE Medical Systems Ltd,** HL(E) [2001] ICR 73

Partnership

Continuity of employment

Claimants employed by partnership of two solicitors — One solicitor struck off — Whether continuity of employment maintained where partnership dissolved and business carried on by sole partner — Employment Rights Act 1996, s 218(5) **Bower v Stevens,** CA [2004] ICR 1582

Pension scheme

Entitlement to pension

Redundancy — Whether retirement "at employer's request" — Whether distinction between compulsory and voluntary redundancy
AGCO Ltd v Massey Ferguson Works Pension Trust Ltd, CA [2004] ICR 15

Final salary

Remuneration for purposes of calculating final salary excluding "non contractual" overtime — Employee's contractual duties involving work outside normal hours — Whether pay for overtime worked to be included in calculation — Local Government Pension Scheme Regulations 1995, reg C2 **Newham London Borough Council v Skingle,** Jacob J [2002] ICR 1118, CA [2003] ICR 1008

EMPLOYMENT—*continued*
Pension scheme—*continued*
Final salary—continued
Teacher moving to lower pay scale on restructuring but maintaining nominal salary — Whether employed at "reduced rate of contributable salary" — Teachers' Pensions Regulations 1997, regs C1(2), H1, Sch 10, Pt II, para 13 **Secretary of State for Education and Skills v Bailey,** Pumfrey J [2004] ICR 181

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Executive director relinquishing responsibilities of managing director but continuing as unpaid non-executive director — Whether "retirement" — Whether payments from pension fund chargeable to tax — Income and Corporation Taxes Act 1988, s 600(1)(2)
Venables v Hornby, Lawrence Collins J [2002] ICR 81
CA [2003] ICR 186
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Protected disclosure
Reasonable belief
Employee dismissed following disclosure of information — Tribunal finding information disclosed factually incorrect — Whether employee having "reasonable belief" disclosure showing relevant failure — Whether "protected disclosure" — Employment Rights Act 1996, s 43B(1) (as inserted by Public Interest Disclosure Act 1998, s 1)
Darnton v University of Surrey, EAT [2003] ICR 615

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Statutory provisions coming into force after disclosure but before employer's detrimentary act — Whether statutory remedy available — Employment Rights Act 1996, s 47B (as inserted by Public Interest Disclosure Act 1998, s 2) **Meteorological Office v Edgar,** EAT [2002] ICR 149

Teacher subjected to detriment and dismissal for making protected disclosure — Award of £42,500 for injury to feelings — Whether excessive — Whether aggravated damages available — Whether exemplary damages available — Employment Rights Act 1996, ss 47B (as inserted by Public Interest Disclosure Act 1998, s 2), 49 **Virgo Fidelis Senior School v Boyle,** EAT [2004] ICR 1210

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Employee complaining of detriment and dismissal for making protected disclosure — Tribunal finding protected disclosure principal reason for dismissal — Employer's witnesses as to employees' good faith and reasonableness of disclosure excluded — Whether relevant evidence — Employment Rights Act 1996, ss 47B, 103A (as inserted by Public Interest Disclosure Act 1998, ss 2, 5) **ALM Medical Services Ltd v Bladon,** CA [2002] ICR 1444

Tribunal finding disclosures made for reasons of personal antagonism — Whether employee's motive relevant to assessment of good faith — Whether post disclosure conduct relevant — Employment Rights Act 1996, ss 43G(1)(a), 103A (as inserted by Public Interest Disclosure Act 1998, ss 1, 5) **Street v Derbyshire Unemployed Workers' Centre,** EAT [2004] ICR 213

Redundancy *see also* **Unfair dismissal:** *Excluded classes*
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Curr v Marks & Spencer plc, CA [2003] ICR 443

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Law Society intervention in firm of solicitors — Agents effecting intervention telling employees no longer required but free to remain on voluntary basis — Transfer of firm — Whether intervention operating to terminate contracts of employment — Whether employees dismissed — Solicitors Act 1974, s 35 — Employment Rights Act 1996, s 136(5)
Barnes v Leavesley, EAT [2001] ICR 38

Trade union consultation
Merger of companies resulting in redundancies — Whether duty to consult arising before employers' proposals formulated — Field staff assigned to branch offices — Whether branch office relevant "establishment" — Trade Union and Labour Relations (Consolidation) Act 1992, s 188(1)(1A) (as substituted by Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995, reg 3) — Council Directive 75/129/EEC, arts 1, 2 (as amended by Council Directive 92/56/EC, art 1)
MSF v Refuge Assurance plc, EAT [2002] ICR 1365

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Redundancy—*continued*
Trade union consultation—*continued*
Parent company withdrawing financial support from employers — Employees dismissed without proper consultation — Whether special circumstances — Trade Union and Labour Relations (Consolidation) Act 1992, s 188(4)(7) (as amended by Trade Union Reform and Employment Rights Act 1993, s 34(2) and Collective Redundancies and Transfer of Undertakings Regulations 1995, reg 3) — Council Directive 98/59/EC, art 2 **GMB v Amicus,** EAT [2003] ICR 1396

Protective award — Approach to assessment — Trade Union and Labour Relations (Consolidation) Act 1992, s 189 (as amended by Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995, reg 4 and Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999, reg 5) **Susie Radin Ltd v GMB,** CA [2004] ICR 893

Protective award — Award made more than three months after expiry of protected period — Failure to pay remuneration under award — Whether reasonably practicable to present complaint in time — Whether further period reasonable — Trade Union and Labour Relations (Consolidation) Act 1992, ss 189(2)(3), 192
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Reorganisation by employer — Employee refusing to undertake additional duties — Whether diminution in employer's requirements for work of a particular kind — Whether dismissal by reason of redundancy — Employment Rights Act 1996, s 139(1)(b)(i)
Shawkat v Nottingham City Hospital NHS Trust (No 2), CA [2002] ICR 7

Right to be accompanied
Disciplinary hearing
Employee refused representation at investigatory interview resulting in oral warning — Warning remaining on employee's record for 12 months — Whether "formal warning" — Whether interview "disciplinary hearing" — Employment Relations Act 1999, ss 10, 13(4)
London Underground Ltd v Ferenc-Batchelor, EAT [2003] ICR 656

Time off
Health and safety representative
Employer refusing representative time off with pay to attend training course — Correct test — Whether employment tribunal jurisdiction to hear claim — Whether appeal tribunal jurisdiction to hear appeal — Employment Tribunals Act 1996 ss 2, 21(1) (as amended by Employment Rights (Dispute Resolution) Act 1998, Sch 1, para 17) — Safety Representatives and Safety Committees Regulations 1977, regs 4(2), 11 — Trade Union and Labour Relations Act 1974, Sch 1, para 16(1) **Duthie v Bath and North East Somerset Council,** EAT [2003] ICR 1405

Time off for dependants
Unfair dismissal
Employee dismissed for high level of absences claiming entitled to time off to deal with child's illness — Dispute as to employee's compliance with requirement to inform employer — Relevant factors in determining whether time taken necessary and reasonable — Employment Rights Act 1996, ss 57A, 99 (as inserted and substituted by Employment Relations Act 1999, ss 8, 9, Sch 4, Pt II, Pt III, para 16) **Qua v John Ford Morrison,** EAT [2003] ICR 482

Employee suffering bereavement reaction dismissed for absence following parents' deaths — Whether time off to take action necessary in consequence of deaths — Employment Rights Act 1996, ss 57A, 99 (as inserted and substituted by Employment Relations Act 1999, s 8, 9, Sch 4, Pt II, Pt III, para 16) **Forster v Cartwright Black,** EAT [2004] ICR 1728

Transfer of undertaking
Effect of transfer
Employee complaining of unfair dismissal on trade union grounds granted interim order continuing employment — Transfer of employer's undertaking — Whether relationship under order constituting "contract of employment" for purposes of transfer — Whether employer's liability under continuation order transferring to transferee — Trade Union and Labour Relations (Consolidation) Act 1992, ss 163, 164 — Employment Rights Act 1996, s 230(2) — Transfer of Undertakings (Protection of Employment) Regulations 1981, regs 2(1), 5(1)
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Employee's claim in negligence for injury at work — Whether liability transferring to transferee — Claim covered by transferor's employer's liability insurance — Whether transferor's rights under policy transferring to transferee — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 5(2) **Martin v Lancashire County Council,** CA [2001] ICR 197

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Transfer of undertaking—*continued*
Effect of transfer—continued
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Matthews (trading as Anton Motors) v Smith, CA [2003] ICR 460

Pension scheme
Early retirement benefits — Transferee offering less favourable terms than transferor — Whether "old-age . . . benefits" — Whether transferred employees entitled to benefit of transferor's terms — Whether employees accepting early retirement waiving right to transferor's terms — Council Directive 77/187/EEC, art 3 **Martin v South Bank University (Case C-04/01),** ECJ [2004] ICR 1234

Early retirement benefits payable on redundancy — Whether "old-age . . . benefits" — Whether liability for benefits transferring to transferee — Benefits implemented by statutory instrument — Whether relevant — Council Directive 77/187/EEC, art 3
Beckmann v Dynamco Whicheloe Macfarlane Ltd (Case C-164/00), ECJ [2003] ICR 50

Protection of employees
Civil servants seconded to work for training and enterprise council on transfer of business to council — Applicants electing to become employees of council 3 years later — Whether transfer of undertaking already completed — Whether continuity of employment preserved — Council Directive 77/187/EEC, arts 1(1), 3(1) **CELTEC Ltd v Astley,** CA [2002] ICR 1289

Employees benefiting from transferor's profit-sharing scheme — Whether entitled to retain benefit of same scheme on transfer — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 5(2) **MITIE Management Services Ltd v French,** EAT [2002] ICR 1395

Failure to consult workforce — Whether liability for failure transferring to transferee — Transfer of Undertakings (Protection of Employment) Regulations 1981, regs 5, 10, 11 (as amended by Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1999, reg 2) **Alamo Group (Europe) Ltd v Tucker,** EAT [2003] ICR 829

Trade union complaining of failure to consult prior to transfer — Whether liability for failure devolving on transferees — Transfer of Undertakings (Protection of Employment) Regulations 1981, regs 5, 10, 11 (as amended by Collective Redundancies and Transfer of Undertakings (Protection of Employment) (Amendment) Regulations 1995, reg 2)
Transport & General Workers' Union v McKinnon, J R Haulage Ltd, EAT(Sc) [2001] ICR 1281

Relevant transfer
Local authority maintenance work contracted out to private company — Company going into liquidation — Work continuing on informal basis — Local authority terminating arrangement and carrying out work itself — Company ceasing business — Whether transfer of undertaking back to local authority — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 3 — Council Directive 77/187/EEC, art 1(1)
Perth and Kinross Council v Donaldson, EAT(Sc) [2004] ICR 667

Unfair dismissal
Employee resigning following changes to working conditions — Complaint of unfair dismissal — Whether necessary to establish repudiatory breach of contract by employer — Employment Rights Act 1996, s 95(1)(c) — Transfer of Undertakings (Protection of Employment) Regulations 1981, regs 5(5) (as amended by Trade Union Reform and Employment Rights Act 1993, s 33), 8(1) — Council Directive 77/187/EEC, art 4(2) **Rossiter v Pendragon plc,** EAT [2001] ICR 1265
CA [2002] ICR 1063

Whether relevant transfer
Body governed by private law carrying out activities promoting interests of local authority — Activities taken over by local authority — Whether "transfer" of undertaking — Council Directive 77/187/EEC, art 1(1)
Mayeur v Association Promotion de l'Information Messine (APIM) (Case C-175/99), ECJ [2002] ICR 1316

Electrician performing routine maintenance at airbase — Maintenance work at base divided into packages and offered to tender — Electrician's work forming one package — Whether package "undertaking" transferred — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 3(1) **Dudley Bower Building Services Ltd v Lowe,** EAT [2003] ICR 843

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Whether relevant transfer—*continued*
Hospital cleaning and catering services moving to different hospital — Employees not transferring — Whether transfer of undertaking — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 3(1) **RCO Support Services Ltd v UNISON,** CA [2002] ICR 751

Local authority awarding contract for bus service to new operator following tendering procedure — No contractual link between old and new operators — No transfer of significant tangible assets but some drivers re-engaged — Whether relevant transfer — Council Directive 77/187/EEC, art 1(1) — Council Directive 92/50/EEC, art 3(1) **Liskojärvi v Oy Liikenne Ab (Case C-172/99),** ECJ [2002] ICR 155

Local authority maintenance contract for whole borough re-contracted to two new contractors partition on borough into two areas — Whether transfer of "a part of an undertaking" to new contractor — Transfer of Undertakings (Protection of Employment) Regulations 1981, regs 2(2), 3(1) **Fairhurst Ward Abbotts Ltd v Botes Building Ltd,** CA [2004] ICR 919

Local authority non-profit-making refuse service transferred to profit-making company — Whether service "in the nature of a commercial venture" — Whether employees' rights protected — Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 2(1) — Council Directive 77/187/EEC, art 1 **Alderson v Secretary of State for Trade and Industry,** CA [2004] ICR 512

Transfer from one undertaking to another of service contracted out by public body — Council Directive 77/187/EEC, art 1(1)
Sánchez Hidalgo v Asociación de Servicios Aser (Case C-173/96) (Note), ECJ [2002] ICR 73

Transfer from public body to private-law company owned by state — Whether within scope of Community Directive — Transferee liable to employees for payments linked to length of service — Whether length of service with transferor to be taken into account — Council Directive 77/187/EEC, arts 1(1), 3(1) **Collino v Telecom Italia SpA (Case C-343/98),** ECJ [2002] ICR 38

Unfair dismissal
Compensation
Assessment
Employee claiming compensation for injury to feelings arising from manner of dismissal — Whether jurisdiction to compensate for non-economic loss — Employment Rights Act 1996, s 123(1) **Dunnachie v Kingston upon Hull City Council,** EAT [2003] ICR 1294
CA [2004] ICR 481
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Loss of future earnings — Tribunal assessing loss by reference to Ogden Tables — Whether appropriate **Kingston upon Hull City Council v Dunnachie (No 3),** EAT [2004] ICR 227

Mitigation of loss — Employee dismissed on medical grounds following back injury — Tribunal finding dismissal unfair — Employee refusing offer of re-engagement on part-time basis — Whether failure to mitigate loss **Wilding v British Telecommunications plc,** CA [2002] ICR 1079

Complaint
Time limit
Complaint posted by first class post on Friday before expiry of time limit on Sunday — Complaint failing to arrive until Tuesday — Whether "reasonably practicable" to have presented complaint in time — Regime for service of documents in employment tribunals — Employment Rights Act 1996, s 111(2)
Consignia plc (formerly The Post Office) v Sealy, CA [2002] ICR 1193

Constructive dismissal
Tribunal dismissing complaint after hearing only applicant's evidence — Whether reasonable exercise of discretion **Logan v Customs and Excise Comrs,** CA [2004] ICR 1

Dismissed
Agreement to terminate employment
Employee faced with choice between job change or redundancy accepting redundancy — Whether dismissed **Lassman v De Vere University Arms Hotel,** EAT [2003] ICR 44

Repudiatory conduct *see also* INDUSTRIAL RELATIONS: **Employment tribunals:** *Review of decision*
Employee with no disciplinary record leaving workplace for 1 hour without permission — Employer imposing final written warning — Whether capable of amounting to repudiatory breach by employer **Stanley Cole (Wainfleet) Ltd v Sheridan,** EAT [2003] ICR 297

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Unfair dismissal—*continued*
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Police
Transport police sergeant's complaint of unfair dismissal — Whether transport police "constabulary maintained by virtue of an enactment" — Whether sergeant employed in "police service" — British Transport Commission Act 1949, s 53(1) (as amended by Railways Act 1993, Sch 10, para 1) — Employment Rights Act 1996, s 200
Spence v British Railways Board, EAT [2001] ICR 232

Retirement
Normal retiring age — Employee with unique position having contractual retirement age of 70 — Whether "normal retiring age" — Employment Rights Act 1996, s 109(1)(a)(i)
Wall v British Compressed Air Society, CA [2004] ICR 408

Work outside Great Britain
Overseas security officer employed by foreign office working almost exclusively abroad — Whether tribunal having jurisdiction to hear unfair dismissal complaint — Whether acceptance of jurisdiction determinative of Great Britain as place employed for purposes of redundancy — Employment Rights Act 1996, ss 139(1), 196
Pitman v Foreign and Commonwealth Office, EAT [2003] ICR 699

Security supervisor employed by English company to work in United Kingdom overseas territory — Whether employment tribunal having jurisdiction to hear complaint of unfair dismissal — Employment Rights Act 1996, ss 94(1), 244(1) **Lawson v Serco Ltd,** CA [2004] ICR 204

Reason for dismissal
Alternative ground
Chief executive of company dismissed on removal as director following takeover — Whether for "substantial reason" justifying dismissal — Employment Rights Act 1996, s 98(1)(b)
Cobley v Forward Technology Industries plc, CA [2003] ICR 1050

Reasonableness of dismissal
Dismissal procedure *see also* **Contract of employment:** *Disciplinary proceedings*
Employee given 3 days' notice of hearing of unparticularised allegations of breach of trust — Whether procedure defective — Internal appeal restricted to demonstrating dismissal unreasonable — Whether capable of curing defective hearing — Whether dismissal unfair
Coxon v Rank Xerox (UK) Ltd, EAT [2003] ICR 628

Misconduct
Applicant cautioned for act of gross indecency in public lavatory — Whether within right to respect for private life — Whether dismissal fair — Guidance on dealing with human rights points in unfair dismissal cases — Employment Rights Act 1996, s 98(4) — Human Rights Act 1998, s 3, Sch 1, Pt I, arts 8, 14 **X v Y,** EAT [2003] ICR 1138
CA [2004] ICR 1634

Dismissal for reason relating to employee's conduct — Employer's investigation into alleged misconduct — Whether objective test applying to reasonableness of investigation — Employment Rights Act 1996, s 98(1)(2)(4) **J Sainsbury plc v Hitt,** CA [2003] ICR 111

Employee admitting misconduct — Employer's disciplinary procedure flawed — Whether "band of reasonable responses" test applicable — Employment Rights Act 1996, s 98(4)
Whitbread plc (trading as Whithead Medway Inns) v Hall, CA [2001] ICR 699

Employee dismissed for taking time off without permission — Refusal of time off constituting racial victimisation — Decision to dismiss tainted with victimisation — Whether internal appeal rectifying defect in decision **Brown v TNT Express Worldwide (UK) Ltd,** CA [2001] ICR 182

Some other substantial reason
Probation officer performing at fetish clubs and involved with sale of bondage products on internet — Whether within right to respect for private life — Whether dismissal fair — Employment Rights Act 1996, s 98(4) — Human Rights Act 1998, Sch 1, Pt I, arts 8, 10
Pay v Lancashire Probation Service, EAT [2004] ICR 187

Wages
Deductions see **Working time provisions:** *Paid annual leave*

National minimum wage
Agency operating 24-hour booking service diverting calls after office hours to employees at home — Whether employees "working" throughout whole shift or only when answering calls — National Minimum Wage Regulations 1999, reg 15(1)
British Nursing Association v Inland Revenue, CA [2003] ICR 19

EMPLOYMENT—*continued*
Wages—*continued*
National minimum wage—continued
Carer on call during 72-hour period living with charge — Daily average hours of active caring assessed at under 7 per day — Whether engaged on "time work" or "unmeasured work" — National Minimum Wage Regulations 1999, regs 3, 6, 27, 28(1)
Walton v Independent Living Organisation Ltd, EAT [2002] ICR 1406
CA [2003] ICR 688

Enforcement notice served on employer for failure to pay minimum wage to former employees — Notice not relating to any reference period ending on or after date of notice — Whether valid — National Minimum Wage Act 1998, s 19(1)(2) **Inland Revenue Comrs v Bebb Travel plc,**
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Worker
Sub-postmaster providing premises equipment and staff — No obligation to attend personally — Whether performing "personally any work or services" — Whether Post Office "client or customer" — Whether sub-postmaster "worker" — Whether "home worker" — Whether "employee" — Employment Rights Act 1996, s 230(1)(3) — National Minimum Wage Act 1998, ss 35(2), 54(3) — Working Time Regulations 1998, reg 2(1)
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Working time provisions
Annual leave
Employee contracted to work 39-hour week with overtime if required — Employee's hours averaging 58 per week — Payment for annual leave based on 39-hour week — Whether payment at "rate of a week's pay" — Employment Rights Act 1996, ss 221, 234 — Working Time Regulations 1998, reg 16 — Council Directive 93/104/EC, art 7
Bamsey v Albon Engineering and Manufacturing plc, EAT [2003] ICR 1224
CA [2004] ICR 1083

Paper boy aged 15 claiming holiday pay — Whether "worker" — Whether entitled to paid leave — Children and Young Persons Act 1933, ss 18 (as amended by Children (Protection at Work) Regulations 1998, reg 2), 30(1) — Working Time Regulations 1998, regs 2(1), 13 — Council Directive 94/33/EC, art 11 **Addison (trading as Brayton News) v Ashby,**
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Gupta v General Medical Council, PC [2002] ICR 785

NATURAL JUSTICE

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Apparent bias

Judge applying for job at consultancy providing expert evidence in case in which judge sitting — Judge withdrawing application — Whether appearance of bias — Appropriate test
In re Medicaments and Related Classes of Goods (No 2), CA [2001] ICR 564

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Asbestos exposure

Claimants developing mesothelioma after exposure to asbestos dust in more than one employment — Inhalation of single or many asbestos fibres equally probable trigger of disease — Claimants unable to establish which employment causing mesothelioma — Whether any employer liable **Fairchild v Glenhaven Funeral Services Ltd,** HL(E) [2002] ICR 798

Claimants developing mesothelioma after exposure to asbestos in more than one employment — Mesothelioma triggered by single inhalation of asbestos dust — Claimants unable to establish which employment causing mesothelioma — Whether any employer liable — Whether claimant suffering other asbestos-related damage entitled to provisional damages for risk of developing mesothelioma — County Courts Act 1984, s 51(1) — CPR r 41.2(2)
Fairchild v Glenhaven Funeral Services Ltd, CA [2002] ICR 412

Vibratory white finger

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Employee contracting asthma at work — Employers aware of risk to employee's health — Whether in breach of duty in allowing employee to continue in job
Coxall v Goodyear Great Britain Ltd, CA [2003] ICR 152

Employee suffering psychiatric injury caused by work-related stress — Whether employer in breach of duty **Barber v Somerset County Council,** HL(E) [2004] ICR 457

Employees suffering psychiatric injury caused by work-related stress — Whether employers under duty of care — Whether employers in breach of duty — Appropriate test and approach
Hatton v Sutherland, CA [2002] ICR 613

Employer trustee and administrator of company pension scheme — Employee re-employed by company but not rejoining scheme — Subsequent resignation due to ill-health — Employee dying before start date of deferred pension — Estate entitled only to return of contributions rather than annuity for dependants had employee rejoined scheme — Whether employer under duty of care to advise employee **Outram v Academy Plastics Ltd,** CA [2001] ICR 367

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Police officer

Police officer transferring from defendant's force to another force — Executive officer with defendant's force handling transfer and reassuring officer as to continuing entitlement to benefit — Whether duty of care owed to officer — Loss of benefit resulting from failure to give correct advice — Whether defendant liable for loss
Lennon v Comr of Police of the Metropolis, CA [2004] ICR 1114

Foreseeability of injury

Nervous shock

Employee's fall in workplace causing physical injury — Anger at occurrence of accident given previous warning to employer exacerbating pre-existing skin condition leading to depressive illness — Whether employer liable for depressive illness in addition to physical injury
Simmons v British Steel plc, HL(Sc) [2004] ICR 585

Safe system of work

Ambulance crew

Ambulance technician injured carrying patient downstairs — Balance between public duty and reasonable care to avoid to risk to crew — Whether employer negligent
King v Sussex Ambulance Service NHS Trust, CA [2002] ICR 1413

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Marine engineers working in ships' engine rooms in 1950s — Danger from asbestos when disturbed — Liability of employer **Jeromson v Shell Tankers (UK) Ltd,** CA [2001] ICR 1223

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Vibration white finger
Employees operating vibratory tools in woodworking factory developing vibration-induced white finger — Whether employer under duty to assess vibration levels and monitor employees for symptoms — Employees' exposure not exceeding recommended maxima — Whether employer liable **Doherty v Rugby Joinery (UK) Ltd,** CA [2004] ICR 1272

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Relief in respect of emoluments from periods of employment as seafarer — Taxpayers working on mobile offshore oil drilling rigs — Rigs moved under tow by tugs — Whether rig "ship" — Whether commissioners' conclusion open to review on appeal — Income and Corporation Taxes Act 1988, s 193(1), Sch 12, para 3(2A) (as inserted by Finance Act 1988, s 67)

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Services of software engineer provided to client through intermediary company — Whether engineer to be regarded as employed by client — Social Security Contributions (Intermediaries) Regulations 2000, reg 6(1) **Synaptek Ltd v Young,** Hart J [2003] ICR 1149

SOCIAL SECURITY

Appeal to social security appeal tribunal

Jurisdiction

Appeal from adjudication officer's decision withdrawn by appellant — Whether jurisdiction to hear withdrawn appeal — Whether lack of jurisdiction capable of waiver — Social Security (Adjudication) Regulations 1995, reg 6(2)

Rydqvist v Secretary of State for Work and Pensions, CA [2002] ICR 1383

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Statutory procedure requiring reference of proposals to advisory committee unless committee agreeing otherwise — Committee's agreement to forego reference based on misrepresentation by Secretary of State's officials — Whether regulation made by Secretary of State thereafter invalid — Social Security Administration Act 1992, ss 170(4), 172(1), 173(1)(b) — Social Security (Incapacity for Work) (General) Regulations 1995, reg 27 (as amended by Social Security (Incapacity for Work and Miscellaneous Amendments) Regulations 1996, reg 2(9))

Howker v Secretary of State for Work and Pensions, CA [2003] ICR 405

Income support

Entitlement

Claimant with "recognisable cycle of work" of one school year employed only during school terms — Claims for income support and job seeker's allowance during holidays — Whether claimant "in remunerative work" during unpaid holidays — Whether holiday periods to be disregarded in calculating average weekly hours of work — Income Support (General) Regulations 1987, reg 5(2)(b)(i)(3B) (as inserted by Income-related Benefit Schemes (Miscellaneous Amendments) Regulations 1995, reg 19(b)) — Jobseeker's Allowance Regulations 1996, reg 51(2) **Banks v Chief Adjudication Officer,** HL(E) [2001] ICR 877

Industrial injuries benefit

Prescribed diseases

Carpal tunnel syndrome caused by use of hand-held tools resting on vibrating sewing machine — Whether "hand-held vibrating tools" — Social Security (Industrial Injuries) (Prescribed Diseases) Regulations 1985, reg 2(a), Sch 1, para A12 (as amended by Social Security (Industrial Injuries) (Prescribed Diseases) Amendment Regulations 1993))

Janicki v Secretary of State for Social Security, CA [2001] ICR 1220

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Entitlement

Full-time student on leave of absence while pregnant refused allowance — Whether direct sex discrimination — Whether statutory provisions contrary to principle of equal treatment — Jobseeker's Allowance Regulations 1996 regs 1(3), 15 — Council Directive 79/7/EEC, art 4

Walter v Secretary of State for Social Security, CA [2002] ICR 540

TRADE DISPUTE

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Ballot

Union failing to send ballot papers to two members entitled to vote — Ballot resulting in 26 to nil in favour of industrial action — Whether action having support of ballot — Action consisting of teachers' refusal to accept direction to teach disruptive pupil — Whether "trade dispute" — Trade Union and Labour Relations (Consolidation) Act 1992, ss 227(1), 230(2), 232A, 232B (as inserted by Employment Relations Act 1999, Sch 3, paras 8, 9), 244(1)

P (A Minor) v National Association of School Masters/Union of Women Teachers, CA [2001] ICR 1241
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Procuring breach of contract

Council employees working in assessment and advice unit — Proposal to contract out unit's services to private company — Union balloting members "to persuade council to retain [employees] within its employment" — Whether trade dispute — Union's notice enabling employer to identify 45 employees involved — Whether notice satisfying requirement as to category of employee — Trade Union and Labour Relations (Consolidation) Act 1992, ss 219(1), 226A(2)(c)(3A) (as inserted by Trade Union and Employment Rights Act 1993, s 18(2) and amended by Employment Relations Act 1999, Sch 3, para 3), 244(1)

Westminster County Council v UNISON, CA [2001] ICR 1046

Union giving notice to employer prior to ballot and industrial action — Notice describing affected employees as being "employed in all categories at all workplaces" — Employer no means of identifying union members — Whether notices valid — Trade Union and Labour Relations (Consolidation) Act 1992, ss 226A(2)(3A), 234A(3)(5A) (as inserted by Trade Union Reform and Employment Rights Act 1993, ss 18(2), 21 and amended by Employment Relations Act 1999, Sch 3, paras 3, 11)

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TRADE UNION

Recognition

Reference to central arbitration committee

Employer rejecting union's request for recognition — Union referring issue of appropriate bargaining unit to committee — Employer proposing different bargaining unit — Committee concluding unit proposed by union appropriate — Whether conclusive or committee required to choose between proposed units — Trade Union and Labour Relations (Consolidation) Act 1992, Sch A1, paras 11, 19 (as inserted by Employment Relations Act 1999, s 1(3))

R (Kwik-Fit (GB) Ltd) v Central Arbitration Committee, CA [2002] ICR 1212

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R (British Broadcasting Corpn) v Central Arbitration Committee, Moses J [2003] ICR 1542

Shop stewards

Authority of

Shop steward of closed shop negotiating variation of employment contract — Signed agreement returned to employers 2 months later — Employee subsequently claiming workforce not consulted — Whether shop steward having authority to bind employees to their detriment

Harris v Richard Lawson Autologistics Ltd, CA [2002] ICR 765

TRUSTS

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Maladministration

Council making long service award enhancing employee's pension — Whether lawful — Council subsequently refusing to pay enhanced element of pension following advice award unlawful — Whether maladministration **Barking and Dagenham London Borough Council v Watts,** Jacob J [2003] ICR 1059

Pensions Ombudsman

Costs of appeal — Trustee and insurer of scheme both appealing against decision of ombudsman — Trustee and insurer separately represented — Ombudsman appearing by counsel at hearing of appeal to defend determination — Appeal allowed — Extent of ombudsman's liability in costs — Whether parties separately appearing in same interest both entitled to costs — Whether trustee or insurer to be awarded costs

Moore's (Wallisdown) Ltd v Pensions Ombudsman, Ferris J [2002] ICR 773

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Pensions Ombudsman—continued
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Surplus fund
Occupational pension scheme providing for regular actuarial valuations — Scheme requiring employer to make arrangements to deal with actuarial surplus — Employer using part of surplus to offset existing accrued liabilities to make contributions — Whether permissible — Pensions Act 1995, s 37(1)(2) **National Grid Co plc v Mayes,** HL(E) [2001] ICR 544

Scheme for employees of non-associated employers divided into sections each covering one employer — Some sections in surplus and some in deficit — Proposal for payments to employers of sections in surplus after making statutory provision for members in employer's section — Whether each section "qualifying scheme" for purposes of such provision — Whether statutory provision required for all members of scheme before any payments to employers — Winding up begun prior to commencement of new statutory regime — Whether trustee to comply with notice provisions of new regime — Pension Schemes Act 1993, ss 102(2), 108 — Pensions Act 1995, s 76 — Pensions Act 1995 (Commencement No 10) Order 1997, art 6 **BEC Pension Trustee Ltd v Sheppeck,** Etherton J [2002] ICR 1343

Underprovision
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Mattis v Pollock (trading as Flamingos Nightclub), CA [2003] ICR 1335

Warden of school boarding house sexually abusing residents — Whether employers vicariously liable — Whether sufficient connection between acts of abuse and work warden employed to do
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Police
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Off-duty constable assaulting claimant and locking him in police van — Whether assault committed in purported performance of functions as constable — Whether chief constable vicariously liable — Police Act 1996, s 88 **Weir v Chief Constable of Merseyside Police,** CA [2003] ICR 708

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WORDS AND PHRASES

"*A firm*"—Partnership Act 1890, s 4(1) **Dave v Robinska**, EAT [2003] ICR 1248

"*A part of an undertaking*"—Transfer of Undertakings (Protection of Employment) Regulations 1981, r 3(1) **Fairhurst Ward Abbotts Ltd v Botes Building Ltd**, CA [2004] ICR 919

"*Act done by*"—Sex Discrimination Act 1975, s 17(1)(a) **Chief Constable of Cumbria Police v McGlennon**, EAT [2002] ICR 1156

"*Act extending over a period*"—Sex Discrimination Act 1975, s 76(6)(b) **Comr of Police of the Metropolis v Hendricks**, CA [2003] ICR 530

"*Act extending over a period*"—Race Relations Act 1976, s 68(1)(b) **Derby Specialist Fabrication Ltd v Burton**, EAT [2001] ICR 833

"*Action*"—Trade Union and Labour Relations (Consolidation) Act 1992, s 146(1) **Southwark London Borough Council v Whillier**, EAT [2001] ICR 142, CA [2001] ICR 1016

"*Activities*"—Health and Safety at Work etc Act 1974, s 22(1) (as amended) **Railtrack plc v Smallwood**, Sullivan J [2001] ICR 714

"*Agreement*"—EC Treaty, art 85(1) **Bayer AG v Commission of the European Communities (Case T-41/96)**, CFI [2001] ICR 735

"*Aids*"—Race Relations Act 1976, s 33(1) **Anyanwu v South Bank Student Union (Commission for Racial Equality intervening)**, HL(E) [2001] ICR 391

"*Amount of work done*"—Employment Rights Act 1996, s 221 **Evans v The Malley Organisation (trading as First Business Support)**, CA [2003] ICR 432

"*Any other known address or place of business*"—Employment Tribunals (Constitution and Procedure) Regulations 1993, Sch 1, r 20(3)(c)(ii) **Zietsman (trading as Berkshire Orthodontics) v Stubbington**, EAT [2002] ICR 249

"*Appearing to involve*"—Employment Tribunals (Constitutions and Rules of Procedure) Regulations 2001, Sch 1, r 15(6) **X v Comr of Police of the Metropolis**, EAT [2003] ICR 1031

"*Appropriate*"—Council Directive 90/269/EEC **King v Sussex Ambulance Service NHS Trust**, CA [2002] ICR 1413

"*Arrangements*"—Race Relations Act 1976, s 4(1)(a) **Hussain v King's College Hospital NHS Trust**, CA [2002] ICR 1433

"*Arrangements . . . for the purpose of determing to whom to offer employment*"—Disability Discrimination Act 1995, s 4(1)(a) **Murray v Newham Citizens Advice Bureau**, EAT [2001] ICR 708

"*Arrears of pay*"—Employment Rights Act 1996, s 184(1)(a) **Benson v Secretary of State for Trade and Industry**, EAT [2003] ICR 1082

"*As a result of*"—Disability Discrimination Act 1995 , Sch I, para 8(1)(b) **Kirton v Tetrosyl Ltd**, CA [2003] ICR 1237

"*Authorisation*"—Race Relations Act 1976, s 12(1) **Ali v McDonagh**, CA [2002] ICR 1026

"*Body*"—Race Relations Act 1976, s 12(1) **Ali v McDonagh**, CA [2002] ICR 1026

"*Business undertaking*"—Working Time Regulations 1998, reg 2(1)(b) **Byrne Bros (Formworks) Ltd v Baird**, EAT [2002] ICR 667

"*By dismissing*"—Disability Discrimination Act 1995, s 4(2)(d) **Comr of Police of the Metropolis v Harley**, EAT [2001] ICR 927

"*By reason that*"—Race Relations Act 1976, s 2(1)(a) **Chief Constable of the West Yorkshire Police v Khan**, HL(E) [2001] ICR 1065

"*Client or customer*"—Employment Rights Act 1996, s 230(3) **Wolstenholme v Post Office Ltd**, EAT [2003] ICR 546

"*Collective agreeement*"—Working Time Regulations 1998, reg 2(1) **Prison Service v Bewley**, EAT [2004] ICR 422

"*Concerned with the . . . administration of . . . the scheme*"—Pension Schemes Act 1993, s 1464(b) (as substituted) **R (Britannic Asset Management Ltd) v Pensions Ombudsman**, CA [2003] ICR 99

"*Conditions*"—Disability Discrimination Act 1995, Sch 1, para 1(2)(b) **Murray v Newham Citizens Advice Bureau Ltd (No 2)**, EAT [2003] ICR 643

"*Contemplating*"—Council Directive 75/129/EEC, art 2(1) **MSF v Refuge Assurance plc**, EAT [2002] ICR 1365

"*Continuously employed*"—Employment Rights Act 1996, s 162(1) **Curr v Marks & Spencer plc**, CA [2003] ICR 443

"*Contract of employment*"—Employment Rights Act 1996, s 230 (2) **Dowling v M E Ilic Haulage**, EAT [2004] ICR 1176

"*Contract worker*"—Race Relations Act 1976, s 7(1) **North Essex Health Authority v David-John**, EAT [2004] ICR 112

"*Court*"—Human Rights Act 1998, s 4(5) **Whittaker v P & D Watson (trading as P & M Watson Haulage)**, EAT [2002] ICR 1244

"*Disciplinary hearing*"—Employment Relations Act 1999, s 13(4) **London Underground Ltd v Ferenc-Batchelor**, EAT [2003] ICR 656

"*Dismissing*"—Race Relations Act 1976, s 4(2)(c) **Derby Specialist Fabrication Ltd v Burton**, EAT [2001] ICR 833

"*Dismissing*"—Disability Discrimination Act 1995, s 4(2)(d) **Catherall v Michelin Tyres plc**, EAT [2003] ICR 28

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"*Employment*"—Race Relations Act 1976, s 4(1) **Patterson v Legal Services Commission**, EAT and CA [2004] ICR 312

"*Employment*"—Race Relations Act 1976, s 78(1) **North Essex Health Authority v David-John**, EAT [2004] ICR 112

"*Engagement in a particular profession*"—Race Relations Act 1976, s 12(1) **Ali v McDonagh**, CA [2002] ICR 1026

"*Establishment*"—Trade Union and Labour Relations (Consolidation) Act 1992, s 188(1)
MSF v Refuge Assurance plc, EAT [2002] ICR 1365

"*Facilitates, engagement in . . . profession*"—Race Relations Act 1976, s 12(1)
Patterson v Legal Services Commission, EAT and CA [2004] ICR 312

"*For any person at work there*"—Construction (Health, Safety and Welfare) Regulations 1996, reg 5
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"*Formal warning*"—Employment Relations Act 1999, s 13(4)(b)
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"*Forseeable surge of activity*"—Working Time Regulations 1998, reg 21(d)
Gallagher v Alpha Catering Services Ltd (trading as Alpha Flight Services), EAT [2004] ICR 1489

"*Hand-held vibrating tools*"—Social Security (Industries Injuries) (Prescribed Diseases) Regulations 1985, Sch I, para A12 (as amended) **Janicki v Secretary of State for Social Security**, CA [2001] ICR 1220

"*Hold office*"—Local Government Act 1972, s 111(2)
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"*Home worker*"—National Minimum Wage Act 1998, s 35(2) **Wolstenholme v Post Office Ltd**, EAT [2003] ICR 546

"*Impairment*"—Disability Discrimination Act 1995, s 1(1)
McNicol v Balfour Beatty Rail Maintenance Ltd, CA [2002] ICR 1498

"*Impartial*"—Human Rights Act 1998, Sch 1, art 6(1) **Lawal v Northern Spirit Ltd**, HL(E) [2003] ICR 856

"*In remunerative work*"—Income Support (General) Regulations 1987, reg 5(3); Jobseeker's Allowance Regulations 1996, reg 52(1) **Banks v Chief Adjudication Officer**, HL(E) [2001] ICR 877

"*In the course of his employment*"—Race Relations Act 1976, s 32(1)
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"*In the execution of duty*"—Police Pensions Regulations 1987, reg B4(1) **R (Stunt) v Mallett**, CA [2001] ICR 989

"*In the nature of a commercial venture*"—Transfer of Undertakings (Protection of Employment) Regulations 1981, reg 2(1) **Alderson v Secretary of State for Trade and Industry**, CA [2004] ICR 512

"*Independent and impartial*"—Convention for the Protection of Human Right and Fundamental Freedoms, art 6(1) **Scanfuture (UK) Ltd v Secretary of State for Trade and Industry**, EAT [2001] ICR 1096

"*Independent and impartial*"—Human Rights Act 1998, Sch 1, art 6(1) **Lawal v Northern Spirit Ltd**, EAT [2002] ICR 486
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"*Liable to be called upon to perform*"—Sex Discrimination Act 1975, s 7B(2)(a) (as inserted)
Chief Constable of the West Yorkshire Police v A (No 2), EAT [2002] ICR 552

"*Likely*"—Disability Discrimination Act 1995, Sch 1, para 2(1)(b)
Latchman v Reed Business Information Ltd, EAT [2002] ICR 1453

"*Need for continuity of service*"—Working Time Regulations 1998, reg 21(c)
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"*Non contractual*"—Local Government Pension Scheme Regulations 1995, reg C2(2)(a)
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"*Non contractual overtime*"—Local Government Pension Scheme Regulations 1995, reg C2(2)
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"*Normal retiring age*"—Employment Rights Act 1996, s 109(1)(a)(i)
Wall v British Compressed Air Society, CA [2004] ICR 408

"*Occasionally only*"—Asbestos Industry Regulations 1931, Preamble
Jeromson v Shell Tankers (UK) Ltd, CA [2001] ICR 1223

"*Old-age benefits*"—Council Directive 77/187/EEC, art 3(3)
Beckmann v Dynamco Whicheloe Macfarlane Ltd (Case C-164/00), ECJ [2003] ICR 50
Martin v South Bank University (Case C-04/01), ECJ [2004] ICR 1234

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"*On the termination of the employee's employment*"—Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, art 3(c) **Miller Bros & F P Butler Ltd v Johnston,** EAT [2002] ICR 744

"*Organisation of workers*"—Race Relations Act 1976, s 11(1) **Medical Protection Society v Sadek,** CA [2004] ICR 1263

"*Personally any work or services*"—Employment Rights Act 1996, s 230(3) **Wolstenholme v Post Office Ltd,** EAT [2003] ICR 546

"*Personally to execute any work or labour*"—Race Relations Act 1976, s 78(1) **Mingeley v Pennock (trading as Amber Cars),** CA [2004] ICR 727

"*Personally . . . work or services*"—Working Time Regulations 1998, reg 2(1)(b) **Byrne Bros (Formworks) Ltd v Baird,** EAT [2002] ICR 667 **Redrow Homes (Yorkshire) Ltd v Wright,** CA [2004] ICR 1126

"*Police service*"—Employment Rights Act 1996, s 200(2) **Spence v British Railways Board,** EAT [2001] ICR 232

"*Property*"—Insolvency Act 1986, s 436 **Grady v Prison Service,** EAT and CA [2003] ICR 753

"*Proposing*"—Trade Union and Labour Relations (Consolidation) Act 1992, s 188(1) **MSF v Refuge Assurance plc,** EAT [2002] ICR 1365

"*Protected disclosure*"—Employment Rights Act 1996, s 47B(1) (as inserted) **Darnton v University of Surrey,** EAT [2003] ICR 615

"*Qualifying scheme*"—Pension Schemes Act 1993, s 102(2) **BEC Pension Trustee Ltd v Sheppeck,** Etherton J [2002] ICR 1343

"*Rate of a week's pay*"—Working Time Regulations 1998, reg 16(1) **Bamsey v Albon Engineering and Manufacturing plc,** EAT [2003] ICR 1224 CA [2004] ICR 1083

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Anya v University of Oxford [2001] ICR 847, CA. **Distinguished,** *Miriki v General Council of the Bar* [2002] ICR 505, CA

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British Nursing Association v Inland Revenue [2001] IRLR 659, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2003] ICR 19, CA

British Telecommunications plc v Williams [1997] IRLR 668, EAT. **Disapproved,** *Macdonald v Ministry of Defence; Pearce v Governing Body of Mayfield Secondary School* [2003] ICR 937, HL(E & Sc)

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Brook v Haringey London Borough Council [1992] IRLR 478, EAT. **Disapproved,** *Allonby v Accrington and Rossendale College* [2001] ICR 1189, CA

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Campbell v Frisbee [2002] EMLR 656. **Decision of Lightman J reversed** [2003] ICR 141, CA

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Carver v Saudi Arabian Airlines [1999] ICR 991, CA. **Applied,** *Saggar v Ministry of Defence* [2004] ICR 1708, EAT

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Cerberus Software Ltd v Rowley [2000] ICR 35, EAT. **Decision of the Employment Appeal Tribunal reversed** [2001] ICR 376, CA

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Chief Constable of Cumbria v McGlennon [2002] ICR 1156, CA. **Followed,** *Yearwood v Comr of Police of the Metropolis* [2004] ICR 1660, EAT. **Approved,** *Chief Constable of Kent County Constabulary v Baskerville* [2003] ICR 1463, CA

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Chief Constable of the West Yorkshire Police v A (No 2) [2003] ICR 161; [2003] 1 All ER 255, CA. **Decision of the Court of Appeal affirmed** [2004] ICR 806, HL(E)

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Clark v Novacold Ltd [1999] ICR 951; [1999] 2 All ER 977, CA. **Applied,** *McAuley Catholic High School v C* [2004] ICR 1563

Clark v Perks (No 2) [2000] STC 428. **Decision of Ferris J reversed** [2002] ICR 302, CA

Clunis v Camden and Islington Health Authority [1998] QB 978; [1998] 2 WLR 902; [1998] 3 All ER 180, CA. **Applied,** *Hewison v Meridian Shipping Services PTE Ltd* [2003] ICR 766, CA

Cobham v Frett [2001] 1 WLR 1775, PC. **Applied,** *Kwamin v Abbey National plc* [2004] ICR 841, EAT

Cole (Stanley) (Wainfleet) Ltd v Sheridan [2003] ICR 297, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2003] ICR 1449, CA

Comr of Police of the Metropolis v Harley [2001] ICR 927, EAT. **Not followed,** *Catherall v Michelin Tyres plc* [2003] ICR 28, EAT

Comr of Police of the Metropolis v Lowrey-Nesbitt [1999] ICR 401, EAT. **Considered,** *Spence v British Railways Board* [2001] ICR 232, EAT

Cooke v Secretary of State for Social Security [2002] 3 All ER 279, 285 CA. **Dicta of Hale LJ followed,** *Scott v Inland Revenue Comrs* [2004] ICR 1410, CA

Coote v Granada Hospitality Ltd (Case C-185/97) [1999] ICR 100; [1998] ECR I-5199, ECJ. **Applied,** *Chief Constable of West Yorkshire Police v A* [2001] ICR 128, EAT. **Distinguished,** *Rhys-Harper v Relaxion Group plc* [2001] ICR 1176, CA

Coote v Granada Hospitality Ltd (No 2) [1999] ICR 942, 950, CA. **Approved,** *Rhys-Harper v Relaxion Group plc; D'Souza v Lambeth London Borough Council; Jones v 3M Healthcare Ltd* [2003] ICR 867, HL(E). **Dicta of Morison J disapproved,** *Rhys-Harper v Relaxion Group plc* [2001] ICR 1176, CA

Coral Squash Clubs Ltd v Matthews [1979] ICR 607, EAT. **Applied,** *Logan v Customs and Excise Comrs* [2004] ICR 1, CA

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Crank v Her Majesty's Stationery Office [1985] ICR 1, EAT. **Overruled,** *Fitzgerald v University of Kent at Canterbury* [2004] ICR 737, CA

Craven-Ellis v Canons Ltd [1936] 2 KB 403; [1936] 2 All ER 106, CA. **Considered,** *Eastbourne Borough Council v Foster* [2002] ICR 234, CA

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Department of Transport v Gallacher [1994] ICR 967, 974–975, CA. **Dicta of Neill LJ applied,** *Southwark London Borough Council v Whillier* [2001] ICR 1016, CA

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Dorling v Sheffield City Council [2002] ELR 367. **Considered,** *R (Verner) v Derby City Council* [2004] ICR 535

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D'Souza v Lambeth London Borough Council [2001] EWCA Civ 794, CA. **Decision of the Court of Appeal affirmed** [2003] ICR 867, HL(E)

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Dubai Aluminium Co Ltd v Salaam [2003] 2 AC 366; [2002] 3 WLR 1913; [2003] 1 All ER 97, HL(E). **Applied,** *Mattis v Pollock (trading as Flamingos Nightclub)* [2003] ICR 1335, CA

Dunn v British Coal Corpn [1993] ICR 591, CA. **Considered,** *Bennett v Compass Group UK and Ireland Ltd* [2002] ICR 1177, CA

Dunnachie v Kingston upon Hull City Council [2003] ICR 1294, EAT. **Decision of the Employment Appeal Tribunal reversed** [2004] ICR 481, CA

Dunnachie v Kingston upon Hull City Council [2004] ICR 481; [2004] 2 All ER 501, CA. **Decision of the Court of Appeal reversed** [2004] ICR 1052, HL(E)

Ealing Hammersmith and Hounslow Family Health Services Authority v Shukla [1993] ICR 710, EAT. **Followed,** *North Essex Health Authority v David-John* [2004] ICR 112, EAT

Eastwood v Magnox Electric plc (Note) [2003] ICR 520, CA. **Decision of the Court of Appeal reversed** [2004] ICR 1064, HL(E)

Eastwood v Magnox Electric plc (Note) [2003] ICR 520, CA. **Distinguished,** *McCabe v Cornwall County Council* [2003] ICR 501, CA

Eaton Ltd v Nuttall [1977] ICR 272; [1977] 1 WLR 549; [1977] 3 All ER 1131, EAT. **Considered,** *Department for Environment Food and Rural Affairs v Robertson* [2004] ICR 1289, EAT

Edge v Pensions Ombudsman [2000] ICR 748; [2000] Ch 602; [2000] 3 WLR 79; [1999] 4 All ER 546, CA. **Considered,** *Moore's (Wallisdown) Ltd v Pensions Ombudsman* [2002] ICR 773

Edwards v Bairstow [1956] AC 14, 36; [1955] 3 WLR 410; [1955] 3 All ER 48, HL(E). **Applied,** *IBA Healthcare Ltd v Office of Fair Trading* [2004] ICR 1364, CA. **Dicta of Lord Radcliffe applied,** *Clark v Perks (No 2)* [2002] ICR 302, CA

Elliott v Pensions Ombudsman [1998] OPLR 21. **Not followed,** *Moore's (Wallisdown) Ltd v Pensions Ombudsman* [2002] ICR 773

Enderby v Frenchay Health Authority (Case C-127/92) [1994] ICR 112; [1994] 1 All ER 495; [1993] ECR I-5535, ECJ. **Applied,** *Nelson v Carillion Services Ltd* [2003] ICR 1256, CA

English v Emery Reimbold & Strick Ltd (Practice Note) [2002] 1 WLR 2409, 2419, para 25; [2002] 3 All ER 385, CA. **Applied,** *Burns v Royal Mail Group plc (formerly Consignia plc)* [2004] ICR 1103, EAT

Essa v Laing Ltd [2003] ICR 1110, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2004] ICR 746, CA

Expro Services Ltd v Smith [1991] ICR 577, EAT. **Considered,** *Alderson v Secretary of State for Trade and Industry* [2004] ICR 512, CA

Facey v Midas Retail Security Ltd [2001] ICR 287, EAT. **Approved,** *Stansbury v Datapulse plc* [2004] ICR 523, CA

Fairchild v Glenhaven Funeral Services Ltd [2002] ICR 412; [2002] 1 WLR 1052, CA. **Decision of the Court of Appeal reversed** [2002] ICR 798, HL(E)

Fairchild v Glenhaven Funeral Services Ltd [2002] ICR 412; [2002] 1 WLR 1052, CA. **Applied,** *McCook v Lobo* [2003] ICR 89, CA

Farah v Comr of Police of the Metropolis [1998] QB 65; [1997] 2 WLR 824; [1997] 1 All ER 289, CA. **Distinguished,** *Chief Constable of Kent County Constabulary v Baskerville* [2003] ICR 1463, CA

Fédération Française des Sociétés d'Assurance v Ministère de l'Agriculture et de la Pêche (Case C-244/94) [1994] ECR I-4013, ECJ. **Considered,** *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* (Cases C-115–117/97) [2001] ICR 774, ECJ

Ferguson v Welsh [1987] 1 WLR 1553; [1987] 3 All ER 777, HL(E). **Applied,** *Fairchild v Glenhaven Funeral Services Ltd* [2002] ICR 412, CA. **Considered,** *Makepeace v Evans Brothers (Reading)* [2001] ICR 241, CA

Fielding (Harold) Ltd v Mansi [1974] ICR 347; [1974] 1 All ER 1035, NIRC. **Not followed,** *Bower v Stevens* [2004] ICR 1582, CA

Fogarty v United Kingdom (2001) 34 EHRR 302. **Considered,** *Matthews v Ministry of Defence* [2002] ICR 1003, CA. **Distinguished,** *Matthews v Ministry of Defence* [2003] ICR 247, HL(E)

Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden [2000] ICR 1283; [2001] 1 All ER 550, CA. **Followed,** *X v Y* [2004] ICR 1634, CA. **Applied,** *J Sainsbury plc v Hitt* [2003] ICR 111, CA; *X v Y* [2003] ICR 1138, EAT

Foreningen af Arbejdsledere i Danmark v A/S Danmols Inventar (Case 105/84) [1985] ECR 2639, ECJ. **Applied,** *Collino v Telecom Italia SpA* (Case C-343/98) [2002] ICR 38, ECJ

Foreningen af Arbejdsledere i Danmark v Daddy's Dance Hall A/S (Case 324/86) [1988] ECR 739, ECJ. **Considered,** *Martin v South Bank University* (Case C-04/01) [2004] ICR 1234, ECJ

Fytche v Wincanton Logistics plc [2003] ICR 1582, CA. **Decision of the Court of Appeal affirmed** [2004] ICR 975, HL(E)

General Council of British Shipping v Deria [1985] ICR 198, EAT. **Followed,** *Stanley Cole (Wainfleet) Ltd v Sheridan* [2003] ICR 297, EAT. **Considered,** *Stanley Cole (Wainfleet) Ltd v Sheridan* [2003] ICR 1449, CA

Gerber Garment Technology Inc v Lectra Systems Ltd [1997] RPC 443, CA. **Considered,** *Bank of Credit and Commerce International SA v Ali (No 2)* [2002] ICR 1258, CA

Gibson v East Riding of Yorkshire Council [2000] ICR 890, CA. **Applied,** *Voteforce Associates Ltd v Quinn* [2002] ICR 1, EAT. **Considered,** *Bamsey v Albon Engineering and Manufacturing plc* [2004] ICR 1083, CA

Glasgow City Council v Marshall [2000] ICR 196, 203; [2000] 1 WLR 333; [2000] 1 All ER 641, HL(Sc). **Dicta of Lord Nicholls of Birkenhead applied,** *Parliamentary Comr for Administration and the Health Service Comrs v Fernandez* [2004] ICR 123, EAT. **Dicta of Lord Nicholls of Birkenhead considered,** *Nelson v Carillion Services Ltd* [2003] ICR 1256, CA

Gloucester Working Men's Club & Institute v James [1986] ICR 603, EAT. **Considered,** *Comr of Police of the Metropolis v Harley* [2001] ICR 927, EAT

Gogay v Hertfordshire County Council [2000] IRLR 703, CA. **Considered,** *McCabe v Cornwall County Council* [2003] ICR 501, CA

Goodwin v Patent Office [1999] ICR 302, EAT. **Considered,** *Rugamer v Sony Music Entertainment UK Ltd* [2002] ICR 381, EAT

Goodwin v United Kingdom (2002) 35 EHRR 447. **Applied,** *Chief Constable of the West Yorkshire Police v A (No 2)* [2003] ICR 161, CA. **Considered,** *Croft v Royal Mail Group plc (formerly Consignia plc)* [2003] ICR 1425, CA

Grady v Prison Service [2003] ICR 753, EAT. **Decision of the Employment Appeal Tribunal reversed** [2003] ICR 753, CA

Grady v Prison Service [2003] ICR 753; [2003] 3 All ER 745, CA. **Applied,** *Khan v Trident Safeguards Ltd* [2004] ICR 1591, CA

Greater Manchester Fire & Civil Defence Authority v Bradley (unreported) 27 April 2001, EAT. **Considered,** *Johnson & Johnson Medical Ltd v Filmer* [2002] ICR 292, EAT

Green v Governing Body of Victoria Road Primary School [2003] ICR 713, EAT. **Decision of the Employment Appeal Tribunal reversed** [2004] ICR 684, CA

Green v Governing Body of Victoria Road Primary School [2004] ICR 684; [2004] 2 All ER 763, CA. **Applied,** *Murphy v Slough Borough Council* [2004] ICR 1163, EAT

Greenwood v British Airways plc [1999] ICR 969, 977 EAT. **Dicta of Judge Peter Clark considered,** *Latchman v Reed Business Information Ltd* [2002] ICR 1453, EAT

Gridquest Ltd (trading as Select Employment) v Blackburn [2002] ICR 682, EAT. **Decision of the Employment Appeal Tribunal reversed** [2002] ICR 1206, CA

Guiot, Criminal proceedings against (Case C-272/94) [1996] ECR I-1905, ECJ. **Applied,** *Criminal proceedings against Arblade* (Cases C-369 and 376/96) [2001] ICR 434, ECJ

Hackney London Borough Council v Usher [1997] ICR 705, EAT. **Considered,** *Care First Partnership Ltd v Roffey* [2001] ICR 87, CA; *Logan v Customs and Excise Comrs* [2004] ICR 1, CA

Halfpenny v IGE Systems Ltd [1999] ICR 834, CA. **Decision of the Court of Appeal reversed** [2001] ICR 73, HL(E)

Hall v Lorimer [1994] ICR 218, 226; [1994] 1 WLR 209; [1994] 1 All ER 250, CA. **Dictum of Nolan LJ applied,** *Synaptek Ltd v Young* [2003] ICR 1149

Hall v Woolston Hall Leisure Ltd [1998] ICR 651, EAT. **Decision of the Employment Appeal Tribunal reversed** [2001] ICR 99, CA

Hall v Woolston Hall Leisure Ltd [2001] ICR 99; [2001] 1 WLR 225; [2000] 4 All ER 787, CA. **Applied,** *Governing Body of Addey and Stanhope School v Vakante* [2003] ICR 290, EAT. **Distinguished,** *Vakante v Governing Body of Addey and Stanhope School (No 2)* [2004] ICR 279, EAT

Hallam v Avery [2000] ICR 583; [2000] 1 WLR 966, CA. **Decision of the Court of Appeal affirmed on different grounds** [2001] ICR 408, HL(E)

Hammersmith and Fulham London Borough Council v Ladejobi [1999] ICR 673, EAT. **Followed,** *Sian v Abbey National plc* [2004] ICR 55, EAT. **Approved,** *Gdynia America Shipping Lines (London) Ltd v Chelminski* [2004] ICR 1523, CA. **Not followed,** *Scotford v SmithKline Beecham* [2002] ICR 264, EAT.

Handels- og Kontorfunktionlrenes Forbund i Danmark v Dansk Arbejdsiverforening, acting on behalf of Danfoss (Case 109/88) [1991] ICR 74; [1989] ECR 3199, ECJ. **Applied,** *Health and Safety Executive v Cadman* [2004] ICR 378, EAT

Harris v Lord Shuttleworth [1994] ICR 991, CA. **Considered,** *Venables v Hornby* [2002] ICR 81

Harrold v Wiltshire Healthcare NHS Trust (unreported) 16 March 1999, EAT. **Not followed,** *Derby Specialist Fabrication Ltd v Burton* [2001] ICR 833, EAT

Harwood-Smart v Caws [2000] PLR 101. **Followed,** *BEC Pension Trustee Ltd v Sheppeck* [2002] ICR 1343

Hatton v Sutherland [2002] ICR 613; [2002] 2 All ER 1, CA. **Considered,** *Pratley v Surrey County Council* [2004] ICR 159, CA

Healey v Bridgend County Borough Council (Note) [2004] ICR 561, CA. **Followed,** *R (Verner) v Derby City Council)* [2004] ICR 535

Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465; [1963] 3 WLR 101; [1963] 2 All ER 575, HL(E). **Applied,** *Lennon v Comr of Police of the Metropolis* [2004] ICR 1114, CA

Heinz (H J) Co Ltd v Kenrick [2000] ICR 491, EAT. **Considered,** *Wright v Governing Body of Bilton High School* [2002] ICR 1463, EAT

Henderson v Henderson (1843) 3 Hare 100. **Considered,** *Chaudhary v Royal College of Surgeons* [2003] ICR 1510, CA

Henderson v Merrett Syndicates Ltd [1995] 2 AC 145, 181; [1994] 3 WLR 761; [1994] 3 All ER 506, HL(E). **Dicta of Lord Goff of Chieveley applied,** *Lennon v Comr of Police of the Metropolis* [2004] ICR 1114, CA

Henderson v Wakefield Shirt Co Ltd [1997] PIQR P413, CA. **Distinguished,** *Coxall v Goodyear Great Britain Ltd* [2003] ICR 152, CA

Henke v Gemeinde Schierke (Case C-298/94) [1997] ICR 746; [1996] ECR I-4989, ECJ. **Considered,** *Mayeur v Association Promotion de l'Information Messine (APIM)* (Case C-175/99) [2002] ICR 1316, ECJ

Hennessy v Craigmyle & Co Ltd [1986] ICR 461, 470, CA. **Dicta of Sir John Donaldson MR applied,** *Vento v Chief Constable of West Yorkshire Police* [2003] ICR 318, CA

Henry v London General Transport Services Ltd [2001] IRLR 132, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 910, CA

High Table Ltd v Horst [1998] ICR 409, CA. **Applied,** *Pitman v Foreign and Commonwealth Office* [2003] ICR 699, EAT

Hillsdown Holdings plc v Inland Revenue Comrs [1999] STC 561. **Considered,** *Venables v Hornby* [2002] ICR 81. **Distinguished,** *Venables v Hornby* [2003] ICR 186, CA

Hinckley and Bosworth London Borough Council v Shaw [2000] LGR 9. **Distinguished,** *Barking and Dagenham London Borough Council v Watts* [2003] ICR 1059

Hipwood v Gloucester Health Authority [1995] ICR 999, 1004–1005, CA. **Dicta of McCowan LJ applied,** *Bennett v Compass Group UK and Ireland Ltd* [2002] ICR 1177, CA

Hoechst AG v Commission of the European Communities (Cases 46/87 and 227/88) [1989] ECR 2859, ECJ. **Considered,** *Roquette Frères SA v Directeur général de la concurrence, de la consommation et de la répression des fraudes* (Case C-94/00) [2004] ICR 66, ECJ

Humphreys v University of Oxford [2000] ICR 405; [2000] 1 All ER 996, CA. **Considered,** *Rossiter v Pendragon plc* [2002] ICR 1063, CA

Hunter v Butler [1996] RTR 396, CA. **Applied,** *Hewison v Meridian Shipping Services PTE Ltd* [2003] ICR 766, CA

Hurditch v Sheffield Health Authority [1989] QB 562; [1989] 2 WLR 827; [1989] 2 All ER 869, CA. **Followed,** *Fairchild v Glenhaven Funeral Services Ltd* [2002] ICR 412, CA

Immigration Advisory Service v Oommen [1997] ICR 683, EAT. **Followed,** *Scotford v SmithKline Beecham* [2002] ICR 264, EAT. **Disapproved,** *Gdynia America Shipping Lines (London) Ltd v Chelminski* [2004] ICR 1523, CA

Inland Revenue Comrs v Bebb Travel [2003] ICR 201, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2003] ICR 1271, CA

Inland Revenue Comrs v Scottish & Newcastle Breweries Ltd [1982] 1 WLR 322, 327; [1982] 2 All ER 230, HL(Sc). **Dicta of Lord Lowry applied,** *Clark v Perks (No 2)* [2002] ICR 302, CA

Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 WLR 896, 912–913; [1998] 1 All ER 98, HL(E). **Dicta of Lord Hoffmann applied,** *Bank of Credit and Commerce International SA v Ali* [2001] ICR 337, HL(E)

Jackson v Chief Adjudication Officer (Cases C-63 and 64/91) [1993] QB 367; [1993] 2 WLR 658; [1993] 3 All ER 265; [1992] ECR I-4737, ECJ. **Considered,** *Hockenjos v Secretary of State for Social Security* [2001] ICR 966, CA

Jacobi v Griffiths (1999) 174 DLR (4th) 71. **Applied,** *Lister v Hesley Hall Ltd* [2001] ICR 665, HL(E)

Jameson v Lovis [2001] EWCA Civ 1264, CA. **Applied,** *Goldman Sachs Services Ltd v Montali* [2002] ICR 1251, EAT

Jayes v IMI (Kynoch) Ltd [1985] ICR 155, CA. **Not followed,** *Anderson v Newham College of Further Education* [2003] ICR 212, CA

Jeetle v Elster [1985] ICR 389, 400, EAT. **Dicta of Beldam J approved,** *Bower v Stevens* [2004] ICR 1582, CA

Jenkins v Kingsgate (Clothing Productions) Ltd (Case 96/80) [1981] ICR 592; [1981] 1 WLR 972; [1981] ECR 911, ECJ. **Considered,** *Parliamentary Comr for Administration and the Health Service Comrs v Fernandez* [2004] ICR 123, EAT

Johnson v Gore-Wood & Co [2002] 2 AC 1; [2001] 2 WLR 72; [2001] 1 All ER 481, HL(E). **Applied,** *Chaudhary v Royal College of Surgeons* [2003] ICR 1510, CA; *R (Foster) v Eastbourne Borough Council* [2004] ICR 1149, CA

Johnson v Ryan [2000] ICR 236, EAT. **Considered,** *Lincolnshire County Council v Hopper* [2002] ICR 1301, EAT

Johnson v Unisys Ltd [1999] ICR 809, CA. **Decision of the Court of Appeal affirmed** [2001] ICR 480, HL(E)

Johnson v Unisys Ltd [2001] ICR 480, 500, para 55; [2003] 1 AC 518; [2001] 2 WLR 1076; [2001] 2 All ER 801, HL(E). **Applied,** *Horkulak v Cantor Fitzgerald International* [2004] ICR 697. **Considered,** *McCabe v Cornwall County Council* [2003] ICR 501, CA. **Dicta of Lord Hoffmann considered,** *Dunnachie v Kingston upon Hull City Council* [2004] ICR 481, CA. **Explained,** *Dunnachie v Kingston upon Hull City Council* [2003] ICR 1294, EAT. **Dicta of Lord Hoffmann not applied,** *Dunnachie v Kingston upon Hull City Council* [2004] ICR 1052, HL(E). **Distinguished,** *Eastwood v Magnox Electric plc* [2004] ICR 1064, HL(E)

Johnston v Chief Constable of the Royal Ulster Constabulary (Case 222/84) [1987] ICR 83; [1987] QB 129; [1986] 3 WLR 1038; [1986] 3 All ER 135; [1980] ECR 1651, ECJ. **Applied,** *Chief Constable of the West Yorkshire Police v A* [2001] ICR 128, EAT

Jones v 3M Healthcare Ltd [2002] ICR 341, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 1124, CA

Jones v 3M Healthcare Ltd [2002] ICR 1124, CA. **Decision of the Court of Appeal reversed** [2003] ICR 867, HL(E)

Jones v Governing Body of Burdett Coutts School [1999] ICR 38, CA. **Considered,** *Comr of Police of the Metropolis v Hendricks* [2003] ICR 530, CA

Jones v Mid-Glamorgan County Council [1997] ICR 815, 826, CA. **Dicta of Waite LJ applied,** *Logan v Customs and Excise Comrs* [2004] ICR 1, CA

Jowitt v Pioneer Technology (UK) Ltd [2002] IRLR 790, EAT. **Decision of the Employment Appeal Tribunal reversed** [2003] ICR 1120, CA

Kalanke v Freie Hansestadt Bremen (Case C-450/93) [1996] ICR 314; [1996] All ER (EC) 66; [1995] ECR I-3051, ECJ. **Considered,** *Marschall v Land Nordrhein-Westfalen* (Case C-4009/95) [2001] ICR 45, ECJ

Kelly v First Engineering Ltd 1999 SCLR 1025, Ct of Sess. **Considered,** *Hammond v Comr of Police of the Metropolis* [2004] ICR 1467, CA

Kelly v Liverpool Maritime Terminals Ltd [1988] IRLR 310, CA. **Explained,** *Halfpenny v IGE Systems Ltd* [2001] ICR 73, HL(E)

Kelly v Northern Ireland Housing Executive [1998] ICR 828; [1999] 1 AC 428; [1998] 3 WLR 735, HL(NI). **Distinguished,** *Patterson v Legal Services Commission* [2004] ICR 312, EAT and CA

Kenny v Hampshire Constabulary [1999] ICR 27, EAT. **Considered,** *Edwards v Mid-Suffolk District Council* [2001] ICR 616, CA

Kerry Foods Ltd v Creber [2000] ICR 556, EAT. **Followed,** *Alamo Group (Europe) Ltd v Tucker* [2003] ICR 829, EAT. **Distinguished,** *Transport & General Workers' Union v McKinnon, J R Haulage Ltd* [2001] ICR 1281, EAT(Sc)

Khan v General Medical Council [1996] ICR 1032, 1043–1044, CA. **Dicta of Hoffmann LJ applied,** *Chaudhary v Royal College of Surgeons* [2003] ICR 1510, CA

Kigass Aero Components Ltd v Brown [2002] ICR 697, 700, 702, paras 8, 12, EAT. **Dicta of Lindsay J explained,** *Canada Life Ltd v Gray* [2004] ICR 673, EAT

King v Great Britain-China Centre [1992] ICR 516, 529, CA. **Applied,** *Anya v University of Oxford* [2001] ICR 847, CA. **Dicta of Neill LJ applied,** *Rowden v Dutton Gregory* [2002] ICR 971, EAT

Kirby v Manpower Services Commission [1980] ICR 420; [1980] 1 WLR 725; [1980] 3 All ER 334, EAT. **Not applied,** *Chief Constable of the West Yorkshire Police v Khan* [2001] ICR 1065, HL(E)

Kirton v Tetrosyl Ltd [2003] ICR 37, EAT. **Decision of the Employment Appeal Tribunal reversed** [2003] ICR 1237, CA

Knulty v Eloc Electro-Optiek and Communicatie BV [1979] ICR 827. **Disapproved,** *Zietsman (trading as Berkshire Orthodontics) v Stubbington* [2002] ICR 249, EAT

Koonjul v Thameslink Healthcare Services [2000] PIQR P123, CA. **Considered,** *O'Neill v DSG Retail Ltd* [2003] ICR 222, CA

Kossinski v Chrysler United Kingdom Ltd (1973) 15 KIR 225, CA. **Distinguished,** *Coxall v Goodyear Great Britain Ltd* [2003] ICR 152, CA

Kramer v South Bedfordshire Community Health Care Trust [1995] ICR 1066. **Considered,** *Skidmore v Dartford & Gravesham NHS Trust* [2001] ICR 911, EAT. **Disapproved,** *Saeed v Royal Wolverhampton Hospitals NHS Trust* [2001] ICR 903, CA; [2003] ICR 721, CA

Kudrath v Ministry of Defence (unreported) 26 April 1999, EAT. **Approved,** *Stansbury v Datapulse plc* [2004] ICR 523, CA

Kuttapan v Croydon London Borough Council [1999] IRLR 349, EAT. **Followed,** *Maurice v Betterware UK Ltd* [2001] ICR 14, EAT

Kuwait Airways Corpn v Iraqi Airways Co (Nos 4 and 5) [2002] 2 AC 883, 1091,; [2002] 2 WLR 1353; [2002] 3 All ER 209, HL(E). **Dicta of Lord Nicholls of Birkenhead applied,** *Essa v Laing Ltd* [2004] ICR 746, CA

Kwamin v Abbey National plc [2004] ICR 841, EAT. **Followed,** *Yearwood v Comr of Police of the Metropolis* [2004] ICR 1660

Kwik Save Stores Ltd v Greaves [1998] ICR 848, CA. **Overruled,** *Halfpenny v IGE Systems Ltd* [2001] ICR 73, HL(E)

Lambert v Croydon College [1999] ICR 409, EAT. **Overruled,** *Fitzgerald v University of Kent at Canterbury* [2004] ICR 737, CA

Lawal v Northern Spirit Ltd [2002] ICR 486, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 1507, CA

Lawal v Northern Spirit Ltd [2002] ICR 1507, CA. **Decision of the Court of Appeal reversed** [2003] ICR 856, HL(E)

Lawrence v Regent Office Care Ltd [1999] ICR 654, EAT. **Considered,** *South Ayrshire Council v Morton* [2002] ICR 956, Ct of Sess

Lawrence v Regent Office Care Ltd (Case C-320/00) [2003] ICR 1092; [2002] ECR I-7325, ECJ. **Applied,** *Allonby v Accrington and Rossendale College* (Case C-256/01) [2004] ICR 1328, ECJ. **Considered,** *Department for Environment Food and Rural Affairs v Robertson* [2004] ICR 1289, EAT

Leighton v Michael [1995] ICR 1091, EAT. **Followed,** *Governing Body of Addey and Stanhope School v Vakante* [2003] ICR 290, EAT. **Approved,** *Hall v Woolston Hall Leisure Ltd* [2001] ICR 99, CA. **Distinguished,** *Vakante v Governing Body of Addey and Stanhope School (No 2)* [2004] ICR 279, EAT

Lennon v Birmingham City Council [2001] IRLR 826, CA. **Distinguished,** *Ako v Rothschild Asset Management Ltd* [2002] ICR 899, CA

Les Ambassadeurs Club v Bainda [1982] IRLR 5, EAT. **Disapproved,** *Bentwood Bros (Manchester) Ltd v Shepherd* [2003] ICR 1000, CA

Levez v T H Jennings (Harlow Pools) Ltd (Case C-326/96) [1999] ICR 521; [1998] ECR I-7835, ECJ. **Applied,** *Preston v Wolverhampton Healthcare NHS Trust (No 2)* [2001] ICR 217, HL(E)

Lewis v Motorworld Garages Ltd [1986] ICR 157, CA. **Considered,** *Logan v Customs and Excise Comrs* [2004] ICR 1, CA

Lindsay v Ironsides Ray & Vials [1994] ICR 384, EAT. **Considered,** *Stanley Cole (Wainfleet) Ltd v Sheridan* [2003] ICR 1449, CA

List Design Group Ltd v Douglas [2002] ICR 686, EAT. **Followed,** *Canada Life Ltd v Gray* [2004] ICR 673, EAT

Lister v Hesley Hall Ltd [2001] ICR 665; [2002] 1 AC 215; [2001] 2 WLR 1311; [2001] 2 All ER 769, HL(E). **Applied,** *Mattis v Pollock (trading as Flamingos Nightclub)* [2003] ICR 1335, CA

Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451; [2000] 2 WLR 870; [2000] 1 All ER 65, CA. **Applied,** *Facey v Midas Retail Security Ltd* [2001] ICR 287, EAT

L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd [1994] 1 AC 486; [1994] 2 WLR 39; [1994] 1 All ER 20, HL(E). **Applied,** *Meteorological Office v Edgar* [2002] ICR 149, EAT

London Underground Ltd v National Union of Rail, Maritime & Transport Workers [2001] ICR 647, CA. **Distinguished,** *Westminster City Council v UNISON* [2001] ICR 1046, CA

London Underground Ltd v National Union of Railwaymen, Maritime & Transport Staff [1996] ICR 170, 178, CA. **Dicta of Millett LJ applied,** *P (A Minor) v National Association of School Masters/Union of Women Teachers* [2001] ICR 1241, CA. **Considered,** *P (A Minor) v National Association of School Masters/Union of Women Teachers* [2003] ICR 386, HL(E)

Lord Chancellor v Coker [2001] ICR 507, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 321, CA

Lord Chancellor v Coker [2001] ICR 507, EAT. **Not applied,** *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, HL(NI)

MPB Structures Ltd v Munro [2002] IRLR 601, EAT(Sc). **Decision of the Employment Appeal Tribunal (Scotland) affirmed** [2004] ICR 430, Ct of Sess

MPB Structures Ltd v Munro [2004] ICR 430, Ct of Sess. **Not followed,** *Marshalls Clay Products Ltd v Caulfield* [2004] ICR 436, EAT. **Not approved,** *Marshalls Clay Products Ltd v Caulfield* [2004] ICR 1502, CA

McCabe v Cornwall County Council [2003] ICR 501, CA. **Decision of the Court of Appeal affirmed** [2004] ICR 1064, HL(E)

MacCulloch & Wallis Ltd v Moore (unreported) 11 February 2003, EAT. **Considered,** *Forster v Cartwright Black* [2004] ICR 1728, EAT

Macdonald v Ministry of Defence [2001] ICR 1, EAT (Sc). **Decision of the Employment Appeal Tribunal reversed** [2002] ICR 174, Ct of Sess

Macdonald v Ministry of Defence [2002] ICR 174, Ct of Sess. **Decision of the Court of Session affirmed** [2003] ICR 937, HL(Sc)

Macdonald v Ministry of Defence [2002] ICR 174, Ct of Sess. **Applied,** *Pearce v Governing Body of Mayfield Secondary School* [2002] ICR 198, CA

McGhee v National Coal Board [1973] 1 WLR 1; [1972] 3 All ER 1008, HL(Sc). **Distinguished,** *Fairchild v Glenhaven Funeral Services Ltd* [2002] ICR 412, CA

Mackie v John Holt Vintners Ltd (Note) [1982] ICR 146, EAT. **Distinguished,** *Maurice v Betterware UK Ltd* [2001] ICR 14, EAT

McMeechan v Secretary of State for Employment [1997] ICR 549, CA. **Considered,** *Montgomery v Johnson Underwood Ltd* [2001] ICR 819, CA

McNicol v Balfour Beatty Rail Maintenance Ltd [2002] ICR 381, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 1498, CA

Magorrian v Eastern Health and Social Services Board (Case C-246/98) [1998] ICR 979; [1997] ECR I-7153, ECJ. **Applied,** *Preston v Wolverhampton Healthcare NHS Trust (No 2)* [2001] ICR 217, HL(E). **Distinguished,** *Quirk v Burton Hospitals NHS Trust* [2001] ICR 415, EAT; [2002] ICR 602, CA

Mahmud v Bank of Credit and Commerce International SA [1997] ICR 606, 609, 621; [1998] AC 20; [1997] 3 WLR 95; [1997] 3 All ER 1, HL(E). **Applied,** *Bank of Credit and SA v Ali (No 2) Commerce International* [2002] ICR 1258, CA; *Horkulak v Cantor Fitzgerald International* [2004] ICR 697. **Dicta applied,** *Transco plc v O'Brien* [2002] ICR 721, CA. **Distinguished,** *Johnson v Unisys Ltd* [2001] ICR 480, HL(E)

Makepiece v Evans Bros (Reading) [2001] ICR 241, 244, para 7, CA. **Observation of Mantell LJ considered,** *Fairchild v Glenhaven Funeral Services Ltd* [2002] ICR 412, CA

Martinez Sala v Freistaat Bayern (Case C-85/96) [1998] ECR I-2691, 2726, para 63, ECJ. **Dicta applied,** *Grzelczyk v Centre public d'aide sociale Ottignies-Louvain-la-Neuve* (Case C-184/99) [2002] ICR 566, ECJ

Matthews v Ministry of Defence [2002] EWHC 13 (QB). **Decision of Keith J reversed** [2002] ICR 1003, CA

Matthews v Ministry of Defence [2002] ICR 1003; [2002] 1 WLR 2621; [2002] 3 All ER 513, CA. **Decision of the Court of Appeal affirmed** [2003] ICR 247, HL(E)

Merckx v Ford Motors Co (Belgium) SA (Cases C-171 and 172/94) [1997] ICR 352; [1996] ECR I-1253, ECJ. **Considered,** *Rossiter v Pendragon plc* [2002] ICR 1063, CA

Mercury Communications Ltd v Scott-Garner [1984] ICR 74, CA. **Considered,** *Westminster City Council v UNISON* [2001] ICR 1046, CA

Migwain Ltd v Transport and General Workers' Union [1979] ICR 597, 601, EAT. **Dicta of Slynn J followed,** *Zietsman (trading as Berkshire Orthodontics) v Stubbington* [2002] ICR 249, EAT

Miles v Wakefield Metropolitan District Council [1985] ICR 363; [1985] 1 WLR 822; [1985] 1 All ER 905, CA. **Applied,** *Lincolnshire County Council v Hopper* [2002] ICR 1301, EAT

Ministry of Defence v Jeremiah [1980] ICR 13, 31; [1980] QB 87; [1979] 3 WLR 857; [1979] 3 All ER 833, CA. **Dictum of Brightman LJ applied,** *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, HL(NI)

Mirror Group Newspapers Ltd v Gunning [1986] ICR 145; [1986] 1 WLR 546; [1986] 1 All ER 385, CA. **Applied,** *Patterson v Legal Services Commission* [2004] ICR 312, EAT and CA

Mock v Inland Revenue Comrs [1999] IRLR 785, EAT. **Followed,** *Sian v Abbey National plc* [2004] ICR 55, EAT. **Not followed,** *Scotford v SmithKline Beecham* [2002] ICR 264, CA

Morgan v Electrolux Ltd [1991] ICR 369, CA. **Applied,** *Bennett v Southwark London Borough Council* [2002] ICR 881, CA

Morgan v Staffordshire University [2002] ICR 475, 483, para 20, EAT. **Dicta of Lindsay J approved,** *McNicol v Balfour Beatty Rail Maintenance Ltd* [2002] ICR 1498, CA

Morris v Secretary of State for Employment [1985] ICR 522, EAT. **Followed,** *Titchener v Secretary of State for Trade and Industry* [2002] ICR 225, EAT

Mulox IBC Ltd v Geels (Case C-125/92) [1993] ICR I-4075, ECJ. **Considered,** *Weber v Universal Ogden Services Ltd* (Case C-37/00) [2002] ICR 979, ECJ

Murphy v Epsom College [1985] ICR 80, CA. **Considered,** *Shawkat v Nottingham City Hospital NHS Trust (No 2)* [2002] ICR 7, CA

Murray v Foyle Meats Ltd [1999] ICR 827; [2000] 1 AC 51; [1999] 3 WLR 356; [1999] 3 All ER 769, HL(NI). **Applied,** *Shawkat v Nottingham City Hospital NHS Trust (No 2)* [2002] ICR 7, CA

Nagarajan v London Regional Transport [1998] IRLR 73, CA. **Not applied,** *Chief Constable of the West Yorkshire Police v Khan* [2001] ICR 1065, HL(E)

Nagarajan v London Regional Transport [1999] ICR 877, 887; [2000] 1 AC 501; [1999] 3 WLR 425; [1999] 4 All ER 65, HL(E). **Applied,** *Chamberlin v Emokpae* [2004] ICR 1476, EAT. **Dicta of Lord Nicholls of Birkenhead applied,** *Hussain v King's College Hospital NHS Trust* [2002] ICR 1433, CA

National Grid Co plc v Mayes [2000] ICR 174, CA. **Decision of the Court of Appeal reversed** [2001] ICR 544, HL(E)

Net Book Agreement 1957 (No 4), In re [1998] ICR 753, RP Ct. **Considered,** *In re Medicaments and Related Classes of Goods (No 3)* [2001] ICR 306, RP Ct

Nethermere (St Neots) Ltd v Gardiner [1984] ICR 612, CA. **Applied,** *Montgomery v Johnson Underwood Ltd* [2001] ICR 819, CA

Newham London Borough Council v Skingle [2002] ICR 1118. **Decision of Jacob J reversed** [2003] ICR 1008, CA

Newland v Simons & Willer (Hairdressers) Ltd [1981] ICR 521, EAT. **Doubted,** *Hall v Woolston Hall Leisure Ltd* [2001] ICR 99, CA

Nikitas v Solihull Metropolitan Borough Council [1986] ICR 291, EAT. **Followed,** *Maurice v Betterware UK Ltd* [2001] ICR 14, EAT

Nimz v Freie und Hansestadt Hamburg (Case C-184/89) [1991] ECR I-297; [1991] IRLR 222, ECJ. **Considered,** *Health and Safety Executive v Cadman* [2004] ICR 378, EAT

Norton Tool Co Ltd v Tewson [1972] ICR 501; [1973] 1 WLR 45; [1973] 1 All ER 183, NIRC. **Followed,** *Dunnachie v Kingston upon Hull City Council* [2003] ICR 1294, EAT. **Approved,** *Dunnachie v Kingston upon Hull City Council* [2004] ICR 1052, HL(E). **Overruled,** *Dunnachie v Kingston upon Hull City Council* [2004] ICR 481, CA

O'Kelly v Trusthouse Forte plc [1983] ICR 728; [1984] QB 90; [1983] 3 WLR 605; [1983] 3 All ER 456, CA. **Applied,** *Bennett v Southwark London Borough Council* [2002] ICR 881, CA

O'Neill v Symm & Co Ltd [1998] ICR 481, EAT. **Considered,** *Wright v Governing Body of Bilton High School* [2002] ICR 1463, EAT

Omar v Worldwide News Inc (trading as United Press International) [1998] IRLR 291, EAT. **Overruled,** *Kovacs v Queen Mary and Westfield College* [2002] ICR 919, CA

Ord v Upton [2000] Ch 352; [2000] 2 WLR 755; [2000] 1 All ER 193, CA. **Distinguished,** *Khan v Trident Safeguards Ltd* [2004] ICR 1591, CA

Outram v Academy Plastics Ltd [2001] ICR 367, CA. **Distinguished,** *Lennon v Comr of Police of the Metropolis* [2004] ICR 1114, CA

Oxford v Department of Health and Social Security [1977] ICR 884, EAT. **Applied,** *Logan v Customs and Excise Comrs* [2004] ICR 1, CA

P (A Minor) v National Association of School Masters/Union of Women Teachers [2001] ICR 1241, CA. **Decision of the Court of Appeal affirmed** [2003] ICR 386, HL(E)

P v S (Case C-13/94) [1996] ICR 795; [1996] ECR I-2143, ECJ. **Considered,** *Chief Constable of the West Yorkshire Police v A (No 2)* [2004] ICR 806, HL(E). **Distinguished,** *Ashton v Chief Constable of West Mercia Constabulary* [2001] ICR 67, EAT

Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997; [1968] 2 WLR 924; [1968] 1 All ER 694, HL(E). **Applied,** *IBA Healthcare Ltd v Office of Fair Trading* [2004] ICR 1364, CA

Page v Smith [1996] AC 155; [1995] 2 WLR 644; [1995] 2 All ER 736, HL(E). **Applied,** *Simmons v British Steel plc* [2004] ICR 585, HL(Sc)

Patterson v Legal Services Commission [2004] ICR 312, EAT. **Decision of the Employment Appeal Tribunal affirmed in part** [2004] ICR 312, CA

Patel v Nagesan [1995] ICR 988, CA. **Distinguished,** *Wall v British Compressed Air Society* [2004] ICR 408, CA

Pearce v Governing Body of Mayfield Secondary School [2000] ICR 920, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 198, CA

Pearce v Governing Body of Mayfield Secondary School [2002] ICR 198, CA. **Decision of the Court of Appeal affirmed** [2003] ICR 937, HL(E)

Pearce v Governing Body of Mayfield Secondary School [2000] ICR 920, EAT. **Followed,** *Macdonald v Ministry of Defence* [2002] ICR 174, Ct of Sess. **Not followed,** *Macdonald v Ministry of Defence* [2001] ICR 1, EAT(Sc)

Pellegrin v France (1999) 31 EHRR 651. **Considered,** *Matthews v Ministry of Defence* [2002] ICR 1003, CA

Pepper v Hart [1993] ICR 291; [1993] AC 593; [1992] 3 WLR 1032; [1993] 1 All ER 42, HL(E). **Considered,** *Addison (trading as Brayton News) v Ashby* [2003] ICR 667, EAT

Pet Plan Ltd v Protect-A-Pet Ltd [1988] FSR 34, CA. **Applied,** *Goldman Sachs Services Ltd v Montali* [2002] ICR 1251, EAT

Pitts v Hunt [1991] 1 QB 24; [1990] 3 WLR 542; [1990] 3 All ER 344, CA. **Applied,** *Anderson v Newham College of Further Education* [2003] ICR 212, CA

Polkey v A E Dayton Services Ltd [1988] ICR 142; [1988] AC 344; [1987] 3 WLR 1153; [1987] 3 All ER 974, HL(E). **Applied,** *Whitbread plc (trading as Whitbread Medway Inns) v Hall* [2001] ICR 699, CA

Porcelli v Strathclyde Regional Council [1986] ICR 564, Ct of Sess. **Applied,** *Macdonald v Ministry of Defence* [2001] ICR 1, EAT(Sc). **Considered,** *Macdonald v Ministry of Defence; Pearce v Governing Body of Mayfield Secondary School* [2003] ICR 937, HL(E & Sc)

Porter v Magill [2002] 2 AC 357; [2002] 3 WLR 437; [2002] 1 All ER 465, HL(E). **Applied,** *Lawal v Northern Spirit Ltd* [2002] ICR 1507, CA; [2003] ICR 856, HL(E)

Post Office v Adekeye [1997] ICR 110, CA. **Applied,** *Rhys-Harper v Relaxion Group plc* [2001] ICR 1176, CA; *Lawal v Northern Spirit Ltd* [2002] ICR 486, EAT. **Considered,** *Jones v 3M Healthcare Ltd* [2002] ICR 341, EAT. **Overruled,** *Rhys-Harper v Relaxion Group plc; D'Souza v Lambeth London Borough Council; Jones v 3M Healthcare Ltd* [2003] ICR 867, HL(E)

Post Office v Howell [2000] ICR 913, EAT. **Considered,** *Morgan v Brith Gof Cyf* [2001] ICR 978, CA

Post Office v Jones [2000] ICR 388, EAT. **Decision of the Employment Appeal Tribunal affirmed on different grounds** [2001] ICR 805, CA

Post Office v Jones [2001] ICR 805, CA. **Applied,** *Johnson & Johnson Medical Ltd v Filmer* [2002] ICR 292, EAT; *Wright v Governing Body of Bilton High School* [2002] ICR 1463, EAT; *Murphy v Slough Borough Council* [2004] ICR 1163, EAT

Poucet v Assurances Générales de France (Cases C-159 and 160/91) [1993] ECR I-637, ECJ. **Considered,** *Brentjens' Handelsonderneming BV v Stichting Bedrijfspensioenfonds voor de Handel in Bouwmaterialen* (Cases C-115–117/97) [2001] ICR 774, ECJ

Practice Direction (EAT: Procedure) [1996] ICR 422, 427 para 9, EAT. **Applied,** *Facey v Midas Retail Security Ltd* [2001] ICR 287, EAT; *Miriki v General Council of the Bar* [2002] ICR 505, CA

Pratley v Surrey County Council [2002] EWHC 1608 (QB). **Decision of Buckley J affirmed** [2004] ICR 159, CA

Presentaciones Musicales SA v Secunda [1994] Ch 271; [1994] 2 WLR 660; [1994] 2 All ER 737, CA. **Applied,** *Nottinghamshire Healthcare NHS Trust v Prison Officers' Association* [2003] ICR 1192, EAT

Preston v Wolverhampton Healthcare NHS Trust [1997] ICR 899, CA. **Decision of the Court of Appeal varied** [2001] ICR 217, HL(E)

Preston v Wolverhampton Healthcare NHS Trust [1998] ICR 227; [1998] 1 WLR 280; [1998] 1 All ER 528, HL(E). **Considered,** *Young v National Power plc* [2001] ICR 328, CA

Prison Service v Johnson [1997] ICR 275, 283, EAT. **Followed,** *Virgo Fidelis Senior School v Boyle* [2004] ICR 1210, EAT. **Dicta of Smith J approved,** *Vento v Chief Constable of West Yorkshire Police* [2003] ICR 318, CA

Providence Capitol Trustees Ltd v Ayres [1996] 4 All ER 760, 763–764, 765. **Dicta of Chadwick J applied,** *Moore's (Wallisdown) Ltd v Pensions Ombudsman* [2002] ICR 773

Pye (J A) (Oxford) Ltd v Graham [2001] Ch 804; [2001] 2 WLR 1293, CA. **Followed,** *MacDonald v Ministry of Defence* [2002] ICR 174, Ct of Sess

Qua v John Ford Morrison [2003] ICR 482, EAT. **Considered,** *Forster v Cartwright Black* [2004] ICR 1728, EAT

Quinn v Schwarzkopf Ltd [2001] IRLR 67, EAT. **Considered,** *Johnson & Johnson Medical Ltd v Filmer* [2002] ICR 292, EAT

Quirk v Burton Hospitals NHS Trust [2001] ICR 415, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 602, CA

Qureshi v Victoria University of Manchester (Note) [2001] ICR 847, EAT. **Approved,** *Anya v University of Oxford* [2001] ICR 847, CA

R v Broadcasting Corpn, Ex p Lavelle [1983] ICR 99; [1983] 1 WLR 23; [1983] 1 All ER 241. **Applied,** *R (Arthurworrey) v Haringey London Borough Council* [2002] ICR 279

R v British Coal Corpn, Ex p Vardy [1993] ICR 720, 753, DC. **Dicta of Glidewell LJ applied,** *MSF v Refuge Assurance plc* [2002] ICR 1365, EAT

R v Director of Public Prosecutions, Ex p Kebilene [2000] 2 AC 326, 386; [1999] 3 WLR 972; [1999] 4 All ER 801, HL(E). **Dicta of Lord Hope of Craighead applied,** *R v Davies (David Janway)* [2003] ICR 586, CA

R v Gough [1993] AC 646; [1993] 2 WLR 883; [1993] 2 All ER 724, HL(E). **Considered,** *In re Medicaments and Related Classes of Goods (No 2)* [2001] ICR 564, CA

R v Kellam, Ex p South Wales Police Authority [2000] ICR 632. **Considered,** *R (Stunt) v Mallett* [2001] ICR 989, CA

R v Lambert [2002] 2 AC 545; [2001] 3 WLR 206; [2001] 1 All ER 577, HL(E). **Applied,** *Pearce v Governing Body of Mayfield Secondary School* [2002] ICR 198, CA

R v Newcastle-under-Lyme Justices, Ex p Massey [1994] 1 WLR 1684, 1692; [1995] 1 All ER 120, DC. **Dicta of Rose LJ applied,** *Moore's (Wallisdown) Ltd v Pensions Ombudsman* [2002] ICR 773

R v Secretary of State for Social Security, Ex p Moule (unreported) 12 September 1996, Collins J. **Considered,** *Howker v Secretary of State for Work and Pensions* [2003] ICR 405, CA

R v Secretary of State for the Home Department, Ex p Jeyeanthan [2000] 1 WLR 354; [1999] 3 All ER 231, CA. **Distinguished,** *Rydqvist v Secretary of State for Work and Pensions* [2002] ICR 1383, CA

R (Britannic Asset Management Ltd) v Pensions Ombudsman [2002] EWHC 441 (Admin). **Decision of Lightman J affirmed** [2003] ICR 99, CA

R (Broadcasting, Entertainment, Cinematographic and Theatre Union) v Secretary of State for Trade and Industry (Case C-173/99) [2001] ICR 1152; [2001] 1 WLR 2313; [2001] All ER (EC) 647; [2001] ECR I-4881, ECJ. **Considered,** *Voteforce Associates Ltd v Quinn* [2002] ICR 1, EAT. **Distinguished,** *Marshalls Clay Products Ltd v Caulfield* [2004] ICR 1502, CA

R (Dorling) v Sheffield City Council [2003] ICR 424. **Considered,** *R (Verner) v Derby City Council* [2004] ICR 535

R (Foster) v Eastbourne Borough Council [2003] EWHC 948 (Admin). **Decision of Moses J affirmed** [2004] ICR 1149, CA

R (Junttan Oy) v Bristol Magistrates' Court [2002] ICR 1523; [2002] 4 All ER 965, DC. **Decision of the Divisional Court of the Queen's Bench Division reversed in part** [2003] ICR 1475, HL(E)

R (Kwik-Fit (GB) Ltd) v Central Arbitration Committee [2002] EWHC 277 (Admin). **Decision of Elias J reversed** [2002] ICR 1212, CA

R (Touche) v Inner London North Coroner [2001] QB 1206; [2001] 3 WLR 148; [2001] 2 All ER 752, CA. **Considered,** *Moore's (Wallisdown) Ltd v Pensions Ombudsman* [2002] ICR 773

RCO Support Services Ltd v UNISON [2000] ICR 1502, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 751, CA

Race Relations Board v Charter [1973] AC 868; [1973] 2 WLR 299; [1973] 1 All ER 512, HL(E). **Considered,** *Ali v McDonagh* [2002] ICR 1026, CA

Race Relations Board v Dockers' Labour Club and Institute Ltd [1976] AC 285; [1974] 3 WLR 533; [1974] 3 All ER 592, HL(E). **Considered,** *Ali v McDonagh* [2002] ICR 1026, CA

Ransom v Higgs [1974] 1 WLR 1594, 1618; [1974] 3 All ER 949, HL(E). **Dicta of Lord Simon of Glaisdale applied,** *Clark v Perks (No 2)* [2002] ICR 302, CA

Rask v ISS Kantineservice A/S (Case C-2009/91) [1992] ECR I-5755, ECJ. **Applied,** *Collino v Telecom Italia SpA* (C-343/98) [2002] ICR 38, ECJ

Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497, 515; [1968] 2 WLR 775; [1968] 1 All ER 433. **Applied,** *Montgomery v Johnson Underwood Ltd* [2001] ICR 819, CA. **Dictum of MacKenna J applied,** *Synaptek Ltd v Young* [2003] ICR 1149

Red Bank Manufacturing Co Ltd v Meadows [1992] ICR 204, EAT. **Disapproved,** *Stansbury v Datapulse plc* [2004] ICR 523, CA

Reed v Stedman [1999] IRLR 299, EAT. **Considered,** *Comr of Police of the Metropolis v Harley* [2001] ICR 927, EAT

Reid v Rush & Tompkins Group plc [1990] ICR 61; [1990] 1 WLR 212; [1989] 3 All ER 228, CA. **Considered,** *Crossley v Faithful & Gould Holdings Ltd* [2004] ICR 1615, CA

Reisebüro Broede v Sandker (Case C-3/95) [1996] ECR I-6511, 6537–6538, para 28, ECJ. **Dicta applied,** *Criminal proceedings against Arblade* (Cases C-369 and 376/96) [2001] ICR 434, ECJ

Reuben v Brent London Borough Council [2000] ICR 102, EAT. **Approved,** *Tran v Greenwich Vietnam Community Project* [2002] ICR 1101, CA

Rewe-Zentralfinanz eG v Landwirtschaftskammer für das Saarland (Case 33/76) [1976] ECR 1989, ECJ. **Applied,** *Preston v Wolverhampton Healthcare NHS Trust (No 2)* [2001] ICR 217, HL(E)

Rhys-Harper v Relaxion Group plc [2000] IRLR 810, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2001] ICR 1176, CA

Rhys-Harper v Relaxion Group plc [2001] ICR 1176, CA. **Decision of the Court of Appeal reversed** [2003] ICR 867, HL(E)

Rhys-Harper v Relaxion Group plc [2001] ICR 1176, 1178–1179, CA. **Applied,** *Lawal v Northern Spirit Ltd* [2002] ICR 486, EAT. **Considered,** *Jones v 3M Healthcare Ltd* [2002] ICR 341, EAT. **Observations of Pill LJ explained,** *Jones v 3M Healthcare Ltd* [2002] ICR 1124, CA

Rhys-Harper v Relaxion Group plc [2003] ICR 867; [2003] 4 All ER 1113, HL(E). **Applied,** *Metropolitan Police Service v Shoebridge* [2004] ICR 1690, EAT

Robinson v British Island Airways Ltd [1978] ICR 304, EAT. **Considered,** *Shawkat v Nottingham City Hospital NHS Trust (No 2)* [2002] ICR 7, CA

Robinson v Post Office [2000] IRLR 804, EAT. **Followed,** *Apelogun-Gabriels v Lambeth London Borough Council* [2002] ICR 713, CA

Rockfon A/S v Specialarbejderforbundet i Danmark (Case C-449/93) [1996] ICR 673; [1995] ECR I-4291, ECJ. **Applied,** *MSF v Refuge Assurance plc* [2002] ICR 1365, EAT

Rookes v Barnard [1964] AC 1129; [1964] 2 WLR 269; [1964] 1 All ER 367, HL(E). **Considered,** *Virgo Fidelis Senior School v Boyle* [2004] ICR 1210, EAT

Rose v Plenty [1975] ICR 430, 437; [1976] 1 WLR 141; [1976] 1 All ER 97, CA. **Dicta of Scarman LJ applied,** *Lister v Hesley Hall Ltd* [2001] ICR 665, HL(E)

Rossiter v Pendragon plc [2001] ICR 1265, EAT. **Decision of the Employment Appeal Tribunal reversed** [2002] ICR 1063, CA

Rovenska v General Medical Council [1998] ICR 85, 94, CA. **Dicta of Brooke LJ applied,** *Chaudhary v Royal College of Surgeons* [2003] ICR 1510, CA

Roy v Kensington and Chelsea and Westminster Family Practitioner Committee [1990] 1 Med LR 328, CA. **Not followed,** *North Essex Health Authority v David-John* [2004] ICR 112, EAT

Royal Society for the Protection of Birds v Croucher [1984] ICR 604, EAT. **Considered,** *Whitbread plc (trading as Whitbread Medway Inns) v Hall* [2001] ICR 699, CA

Rutherford v Owens-Illinois Inc (1997) 67 Cal Rptr 2d 16. **Considered,** *Fairchild v Glenhaven Funeral Services Ltd* [2002] ICR 798, HL(E)

Rutten v Cross Medical Ltd (Case C-383/95) [1997] ICR 715; [1997] ECR I-57, ECJ. **Considered,** *Weber v Universal Ogden Services Ltd* (Case C-37/00) [2002] ICR 979, ECJ

Saeed v Royal Wolverhampton Hospitals NHS Trust [2000] Lloyd's Rep Med 331. **Decision of Gage J affirmed** [2001] ICR 903, CA

Saeed v Royal Wolverhampton Hospitals NHS Trust [2001] ICR 903, CA. **Applied,** *Skidmore v Dartford & Gravesham NHS Trust* [2002] ICR 403, CA. **Considered,** *Skidmore v Dartford & Gravesham NHS Trust* [2003] ICR 721, CA

St Basil's Centre Ltd v McCrossan [1992] ICR 140, EAT. **Considered,** *Consignia plc (formerly The Post Office) v Sealy* [2002] ICR 1193, CA

Sajid v Sussex Muslim Society [2002] IRLR 113, CA. **Considered,** *Ako v Rothschild Asset Management Ltd* [2002] ICR 899, CA

Saligueira da Silva Mouta v Portugal [2001] 1 FCR 653, ECHR. **Considered,** *Macdonald v Ministry of Defence* [2001] ICR 1, EAT(Sc); [2002] ICR 174, Ct of Sess

Sandoz prodotti farmaceutici SpA v Commission of the European Communities (Case C-277/87) (Summary publication) [1990] ECR I-45, ECJ. **Distinguished,** *Bayer AG v Commission of the European Communities* (Case T-41/96) [2001] ICR 735, CFI

Savory v Holland & Hannen & Cubitts (Southern) Ltd [1964] 1 WLR 1158; [1964] 3 All ER 18, CA. **Considered,** *Makepeace v Evans Bros (Reading)* [2001] ICR 241, CA

Sawyer v Ahsan [2000] ICR 1, EAT. **Considered,** *Secretary of State for Scotland v Mann* [2001] ICR 1005, EAT (Sc). **Overruled,** *Ali v McDonagh* [2002] ICR 1026, CA

Scally v Southern Health and Social Services Board [1991] ICR 771; [1992] 1 AC 294; [1991] 3 WLR 778; [1991] 4 All ER 563, HL(NI). **Applied,** *Outram v Academy Plastics Ltd* [2001] ICR 367, CA. **Distinguished,** *Crossley v Faithful & Gould Holdings Ltd* [2004] ICR 1615, CA

Schmidt v Spar- und Leihkasse der früheren Amter Bordersholm, Keil und Cronshagen (Case C-392/92) [1995] ICR 237; [1994] ECR I-1311, ECJ. **Considered,** *Dudley Bower Building Services Ltd v Lowe* [2003] ICR 843, EAT

Scotford v SmithKline Beecham [2002] ICR 264, EAT. **Distinguished,** *Sian v Abbey National plc* [2004] ICR 55, EAT. **Disapproved,** *Gdynia America Shipping Lines (London) Ltd v Chelminski* [2004] ICR 1523, CA

Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014; [1976] 3 WLR 641; [1976] 3 All ER 665, HL(E). **Applied,** *IBA Healthcare Ltd v Office of Fair Trading* [2004] ICR 1364, CA

Secretary of State for Employment v Mann [1999] ICR 898, HL(E). **Considered,** *Titchener v Secretary of State for Trade and Industry* [2002] ICR 225, EAT

Secretary of State for Trade and Industry v Bottrill [1999] ICR 592; [2000] 1 All ER 915, CA. **Followed,** *Connolly v Sellers Arenascene Ltd* [2001] ICR 760, CA

Selkent Bus Co Ltd v Moore [1996] ICR 836, EAT. **Considered,** *Street v Derbyshire Unemployed Workers' Centre* [2004] ICR 213, EAT

Shamoon v Chief Constable of the Royal Ulster Constabulary [2001] IRLR 520, CA(NI). **Decision of the Court of Appeal in Northern Ireland affirmed on different grounds** [2003] ICR 337, HL(NI)

Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337, HL(NI). **Distinguished,** *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] ICR 1205, EAT

Sheffield v Oxford Controls Ltd [1979] ICR 396, EAT. **Followed,** *Catherall v Michelin Tyres plc* [2003] ICR 28, EAT

Shepherd (F C) & Co Ltd v Jerrom [1985] ICR 552, EAT. **Considered,** *Rai v Somerfield Stores Ltd* [2004] ICR 656, EAT

Sheriff v Klyne Tugs (Lowestoft) Ltd [1999] ICR 1170, 1178–1179, para 22, CA. **Dictum of Stuart-Smith LJ applied,** *Essa v Laing Ltd* [2003] ICR 1110, EAT; [2004] ICR 746, CA

Sian v Abbey National plc [2004] ICR 55, EAT. **Approved,** *Gdynia America Shipping Lines (London) Ltd v Chelminski* [2004] ICR 1523, CA

Sidhu v Aerospace Composite Technology Ltd [1999] IRLR 683, EAT. **Decision of the Employment Appeal Tribunal reversed** [2001] ICR 167, CA

Simmons v British Steel plc 2003 SLT 62. **Decision of the Second Division of the Inner House of the Court of Session affirmed on different grounds** [2004] ICR 585, HL(Sc)

Simper (Peter) & Co Ltd v Cooke [1986] IRLR 19, EAT. **Distinguished,** *Southwark London Borough Council v Jiminez* [2003] ICR 1176, CA

Sindicato de Médicos de Asistencia Pública (SIMAP) v Consellería de Sanidad y Consumo de la Generelidad Valenciana (Case C-303/98) [2001] ICR 1116; [2000] ECR I-7963, ECJ. **Applied,** *Landeshauptstadt Kiel v Jaeger* (Case C-151/02) [2004] ICR 1528, ECJ

Skidmore v Dartford & Gravesham NHS Trust [2001] ICR 911, EAT. **Decision of the Employment Appeal Tribunal reversed** [2002] ICR 403, CA

Skidmore v Dartford & Gravesham NHS Trust [2002] ICR 403, CA. **Decision of the Court of Appeal affirmed** [2003] ICR 721, HL(E)

Skyrail Oceanic Ltd v Coleman [1981] ICR 864, 873, CA. **Applied,** *Chamberlin v Emokpae* [2004] ICR 1476, EAT. **Dictum of Lawton LJ not followed,** *Essa v Laing Ltd* [2003] ICR 1110, EAT

Smith v Gardner Merchant Ltd [1999] ICR 134; [1998] 3 All ER 852, CA. **Followed,** *Macdonald v Ministry of Defence* [2002] ICR 174, Ct of Sess. **Applied,** *Pearce v Governing Body of Mayfield Secondary School* [2002] ICR 198, CA. **Considered,** *Macdonald v Ministry of Defence; Pearce v Governing Body of Mayfield Secondary School* [2003] ICR 937, HL(E & Sc). **Not followed,** *Macdonald v Ministry of Defence* [2001] ICR 1, EAT(Sc)

Smith v United Kingdom (1999) 29 EHRR 493. **Considered,** *Macdonald v Ministry of Defence* [2001] ICR 1, EAT(Sc); [2002] ICR 174, Ct of Sess

Sogbetun v Hackney London Borough Council [1998] ICR 1264, EAT. **Not followed,** *Morgan v Brith Gof Cyf* [2001] ICR 978, EAT

South Ayrshire Council v Morton [2001] IRLR 28, EAT(Sc). **Decision of the Employment Appeal Tribunal affirmed** [2002] ICR 956, Ct of Sess

Southwark London Borough Council v Bartholomew [2004] ICR 358, EAT. **Considered,** *Cooke v Glenrose Fish Co* [2004] ICR 1188, EAT

Southwark London Borough Council v Whillier [2001] ICR 142, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2001] ICR 1016, CA

Spijkers v Gebroeders Benedik Abattoir CV (Case 24/85) [1986] ECR 1119, 1128–1129, ECJ. **Dicta applied,** *RCO Support Services Ltd v UNISON* [2002] ICR 751, CA

Spillers-French (Holdings) Ltd v Union of Shop, Distributive and Allied Workers [1980] ICR 31; [1980] 1 All ER 231, EAT. **Overruled,** *Susie Radin Ltd v GMB* [2004] ICR 893, CA

Spring v Guardian Assurance plc [1994] ICR 596, 612, 647; [1995] 2 AC 296; [1994] 3 WLR 354; [1994] 4 All ER 563, HL(NI). **Dicta of Lord Goff of Chieveley applied,** *Lennon v Comr of Police of the Metropolis* [2004] ICR 1114, CA. **Considered,** *Bank of Credit and Commerce International SA v Ali (No 2)* [2002] ICR 1258, CA. **Dicta of Lord Woolf considered,** *Crossley v Faithful & Gould Holdings Ltd* [2004] ICR 1615, CA

Staffordshire County Council v Barber [1996] ICR 379; [1996] 2 All ER 748, CA. **Distinguished,** *Ako v Rothschild Asset Management Ltd* [2002] ICR 899, CA

Stokes v Guest, Keen & Nettlefold (Bolts and Nuts) Ltd [1968] 1 WLR 1776. **Applied,** *Barber v Somerset County Council* [2004] ICR 457, HL(E)

Strathclyde Regional Council v Wallace [1998] ICR 205, 212; [1998] 1 WLR 259; [1998] 1 All ER 394, HL(Sc). **Dicta of Lord Browne-Wilkinson considered,** *Nelson v Carillion Services Ltd* [2003] ICR 1256, CA

Sutcliffe v Hawker Siddeley Aviation Ltd [1973] ICR 560, NIRC. **Considered,** *Comr of Police of the Metropolis v Harley* [2001] ICR 927, EAT

Süzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice (Case C-13/95) [1997] ICR 662, 670, para 12; [1997] ECR I-1259, ECJ. **Dicta applied,** *Liskojärvi v Oy Liikojärvi Ab* (Case C-172/99) [2002] ICR 155, ECJ. **Considered,** *RCO Support Services Ltd v UNISON* [2002] ICR 751, CA

T, Petitioner 1997 SLT 734. **Considered,** *Macdonald v Ministry of Defence* [2001] ICR 1, EAT(Sc)

Talke Fashions Ltd v Amalgamated Society of Textile Workers and Kindred Trades [1977] ICR 833; [1978] 1 WLR 558; [1978] 2 All ER 649, EAT. **Overruled,** *Susie Radin Ltd v GMB* [2004] ICR 893, CA

Tarnesby v Kensington and Chelsea and Westminster Area Health Authority (Teaching) [1981] ICR 615, HL(E). **Distinguished,** *R (Dorling) v Sheffield City Council* [2003] ICR 424

Tattari v Private Patients Plan Ltd [1998] ICR 106, CA. **Applied,** *Ali v McDonagh* [2002] ICR 1026, CA

Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers- en Schoomaakbedriff (Case C-109/91) [1995] ICR 74; [1993] ECR I-4879, ECJ. **Applied,** *Quirk v Burton Hospitals NHS Trust* [2001] ICR 415, EAT

Terhoeve v Inspecteur van de Belastingdienst Particulieren/Ondernemingen Buitenland (Case C-18/95) [1999] ICR I-345, 391, para 45, ECJ. **Dicta applied,** *Criminal proceedings against Arblade* (Cases C-369 and 376/96) [2001] ICR 434, ECJ

Thomas v Times Book Co Ltd [1966] 1 WLR 911; [1966] 2 All ER 241. **Distinguished,** *Moore's (Wallisdown) Ltd v Pensions Ombudsman* [2002] ICR 773

Thrells Ltd v Lomas [1993] 1 WLR 456; [1993] 2 All ER 546. **Considered,** *BEC Pension Trustee Ltd v Sheppeck* [2002] ICR 1343

Tinnelly & Sons Ltd v United Kingdom (1998) 27 EHRR 249. **Distinguished,** *Matthews v Ministry of Defence* [2003] ICR 247, HL(E)

Tinsley v Milligan [1994] 1 AC 340; [1993] 3 WLR 126; [1993] 3 All ER 65, HL(E). **Considered,** *Hall v Woolston Hall Leisure Ltd* [2001] ICR 99, CA

Tipp-Ex GmbH & Co KG v Commission of the European Communities (Case C-279/87) (Summary publication) [1990] ECR I-261, ECJ. **Distingushed,** *Bayer AG v Commission of the European Communities* (Case T-41/96) [2001] ICR 735, CFI

Tran v Greenwich Vietnam Community Project [2002] ICR 1101, CA. **Considered,** *Burns v Royal Mail Group plc (formerly Consignia plc)* [2004] ICR 1103, EAT

Transport & General Workers' Union v Mckinnon, J R Haulage Ltd [2001] ICR 1281, EAT (Sc.). **Not followed,** *Alamo Group (Europe) Ltd v Tucker* [2003] ICR 829, EAT

Trotman v North Yorkshire County Council [1999] LGR 584, CA. **Overruled,** *Lister v Hesley Hall Ltd* [2001] ICR 665, HL(E)

Tyldesley v TML Plastics Ltd [1996] ICR 356, EAT. **Considered,** *Parliamentary Comr for Administration and the Health Service Comrs v Fernandez* [2004] ICR 123

UK Waste Control Ltd v Wren [1995] ICR 974, EAT. **Approved,** *Alderson v Secretary of State for Trade and Industry* [2004] ICR 512, CA

UPS Europe SA v Commission of the European Communities (Case T-175/99) [2002] ECR II-1915, CFI. **Considered,** *Getmapping plc v Ordnance Survey* [2003] ICR 1

United Arab Emirates v Abdelghafar [1995] ICR 65, EAT. **Considered,** *Peters v Sat Katar Co Ltd* [2003] ICR 1574, CA

University of Manchester v Jones [1993] ICR 474, CA. **Applied,** *Lord Chancellor v Coker* [2001] ICR 507, EAT

University of Nottingham v Eyett [1999] ICR 721; [1999] 2 All ER 437. **Approved,** *Outram v Academy Plastics Ltd* [2001] ICR 367, CA

University of Nottingham v Eyett (No 2) [1999] ICR 730; [1999] 1 WLR 594; [1999] 2 All ER 445. **Not followed,** *Moore's (Wallisdown) Ltd v Pensions Ombudsman* [2002] ICR 773

Venables v Hornby [2002] ICR 81. **Decision of Lawrence Collins J reversed** [2003] ICR 186, CA

Venables v Hornby [2003] ICR 186, CA. **Decision of the Court of Appeal reversed** [2004] ICR 42, HL(E)

Vento v Chief Constable of the West Yorkshire Police [2003] ICR 318, CA. **Followed,** *Dunnachie v Kingston upon Hull City Council* [2004] ICR 481, CA. **Applied,** *Virgo Fidelis Senior School v Boyle* [2004] ICR 1210, EAT; *Scott v Inland Revenue Comrs* [2004] ICR 1410, CA

Vicary v British Telecommunications plc [1999] IRLR 680, EAT. **Considered,** *Abadeh v British Telecommunications plc* [2001] ICR 156, EAT

Vlassopoulou v Ministerium für Justiz, Bundes- und Europaangelegenheiten Baden-Württemberg (Case C-340/89) [1991] ECR I-2357, ECJ. **Applied,** *Conseil National de l'Ordre des Architectes v Dreessen* (Case C-31/00) [2002] ICR 1227, ECJ

Wadi v Cornwall and Isles and Scilly Family Practitioner Committee [1985] ICR 492, EAT. **Followed,** *North Essex Health Authority v David-John* [2004] ICR 112, EAT

Waite v Government Communications Headquarters [1983] ICR 653; [1983] 2 AC 714; [1983] 3 WLR 389; [1983] 2 All ER 1013, HL(E). **Considered,** *Wall v British Compressed Air Society* [2004] ICR 408, CA

Walker v Northumberland County Council [1995] ICR 702. **Approved,** *Hatton v Sutherland* [2002] ICR 613, CA

Wallace v C A Roofing Services Ltd [1966] IRLR 435. **Considered,** *Whitely v Marton Electrical Ltd* [2003] ICR 495, EAT

Walton v Independent Living Organisation Ltd [2002] ICR 1406, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2003] ICR 688, CA

Watt v Fairfield Shipbuilding & Engineering Co Ltd 1999 SLT 1084, Ct of Sess. **Not followed,** *Jeromson v Shell Tankers (UK) Ltd* [2001] ICR 1223, CA

Watt v Hertfordshire County Council [1954] 1 WLR 835; [1954] 2 All ER 368, CA. Followed, *King v Sussex Ambulance Service NHS Trust* [2002] ICR 1413, CA

Weathersfield Ltd v Sargent [1998] ICR 198, EAT. **Considered,** *Derby Specialist Fabrication Ltd v Burton* [2001] ICR 833, EAT

Weathersfield Ltd v Sargent [1999] ICR 425, CA. **Considered,** *Comr of Police of the Metropolis v Harley* [2001] ICR 927, EAT

Western Excavating (ECC) Ltd v Sharp [1978] ICR 221; [1978] QB 761; [1978] 2 WLR 344; [1978] 1 All ER 713, CA. **Applied,** *Rossiter v Pendragon plc* [2002] ICR 1063, CA

Whitbread & Co plc v Mills [1988] ICR 776, EAT. **Distinguished,** *Brown v TNT Express Worldwide (UK) Ltd* [2001] ICR 182, CA

Whitbread plc (trading as Whitbread Medway Inns) v Hall [2001] ICR 699, CA. **Applied,** *J Sainsbury plc v Hitt* [2003] ICR 111, CA

White v Pressed Steel Fisher [1980] IRLR 176, EAT. **Followed,** *Duthie v Bath and North East Somerset Council* [2003] ICR 1405, EAT

Wiggin Alloys Ltd v Jenkins [1981] IRLR 275, EAT. **Overruled,** *Kovacs v Queen Mary and Westfield College* [2002] ICR 919, CA

Williams v Farne Salmon & Trout Ltd 1998 SLT 1329, 1333. **Dicta approved,** *Dugmore v Swansea NHS Trust* [2003] ICR 574, CA

Wilson v Maynard Shipbuilding Consultants AB [1978] ICR 376; [1978] QB 665; [1978] 2 WLR 466; [1978] 2 All ER 78, CA. **Considered,** *Pitman v Foreign and Commonwealth Office* [2003] ICR 699, EAT

Withers v Perry Chain Co Ltd [1961] 1 WLR 1314; [1961] 3 All ER 418, CA. **Distinguished,** *Coxall v Goodyear Great Britain Ltd* [2003] ICR 152, CA

Wilsher v Essex Area Health Authority [1988] AC 1074; [1988] 2 WLR 557; [1988] 1 All ER 871, HL(E). **Distinguished,** *Fairchild v Glenhaven Funeral Services Ltd* [2002] ICR 798, HL(E)

Woodcock v Committee for the Time Being of the Friends School, Wigton [1987] IRLR 98, CA. **Considered,** *Alderson v Secretary of State for Trade and Industry* [2004] ICR 512, CA

Woodward v Hutchins [1977] 1 WLR 760; [1977] 2 All ER 751, CA. **Considered,** *Campbell v Frisbee* [2003] ICR 141, CA

X v Y [2003] ICR 1138, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2004] ICR 1634, CA

York Trailer Co Ltd v Sparkes [1973] ICR 518, NIRC. **Approved,** *Bentwood Bros (Manchester) Ltd v Shepherd* [2003] ICR 1000, CA

Young v National Power plc [2000] ICR 78, EAT. **Decision of the Employment Appeal Tribunal affirmed** [2001] ICR 328, CA

Z v United Kingdom (2001) 34 EHRR 97. **Considered,** *Matthews v Ministry of Defence* [2003] ICR 247, HL(E)

1890 **Partnership Act** (53 & 54 Vict c 39)
s 5: Dave v Robinska [2003] ICR 1248, EAT
1925 **Trustee Act** (15 & 16 Geo 5, c 19)
s 15: Bradstock Group Pension Scheme Trustees Ltd v Bradstock Group plc [2002] ICR 1427
1933 **Children and Young Persons Act** (23 Geo 5, c 12)
ss 18, 30(1) (as amended): Addison (trading as Brayton News) v Ashby [2003] ICR 667, EAT
1945 **Law Reform (Contributory Negligence) Act** (8 & 9 Geo 6, c 28)
s 1(1): Anderson v Newham College of Further Education [2003] ICR 212, CA
1947 **Crown Proceedings Act** (10 & 11 Geo 6 c 44)
s 10: Matthews v Ministry of Defence [2002] ICR 1003, CA; [2003] ICR 247, HL(E)
1949 **British Transport Commission Act** (12 & 13 Geo 6, c xxix)
s 53(1) (as amended): Spence v British Railways Board [2001] ICR 232, EAT
1953 **Registration Service Act** (1 & 2 Eliz 2, c 37)
s 6(4): Lincolnshire County Council v Hopper [2002] ICR 1301, EAT
1957 **Occupiers' Liability Act** (5 & 6 Eliz 2 c 31)
s 2: Fairchild v Glenhaven Funeral Services Ltd [2002] ICR 412, CA
McCook v Lobo [2003] ICR 89, CA
1970 **Equal Pay Act** (c 41)
s 1 (as substituted): Department for Environment Food and Rural Affairs v Robertson [2004] ICR 1289, EAT
s 1(1), Sch 1, para 8(1): Kirton v Tetrosyl Ltd [2003[ICR 37, 1237, CA
ss 1(1)(2), 2(4) (as substituted): Preston v Wolverhampton Healthcare NHS Trust (No 3) [2004] ICR 993, EAT
s 1(3) (as substituted): Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205, EAT
Nelson v Carillion Services Ltd [2003] ICR 1256, CA
Parliamentary Comr for Administration and the Health Service Comrs v Fernandez [2004] ICR 123, EAT
Health and Safety Executive v Cadman [2004] ICR 378, EAT
s 1(6) (as amended): Allonby v Accrington and Rossendale College [2001] ICR 1189, CA
South Ayrshire Council v Morton [2002] ICR 956, Ct of Sess
s 2(4) (as amended): Preston v Wolverhampton Healthcare NHS Trust (No 2) [2001] ICR 217, HL(E)
Young v National Power plc [2001] ICR 328, CA
s 7(2)(b): Chief Constable of the West Yorkshire Police v A (No 2) [2003] ICR 161
ss 54(1), 56(1), 57: Essa v Laing Ltd [2003] ICR 1110, EAT
s 98(4): X v Y [2003] ICR 1138, EAT
1972 **Local Government Act** (c 70)
s 112(2): Nicholls v Greenwich London Borough Council [2003] ICR 1020, CA
1973 **Matrimonial Causes Act** (c 18)
s 11(c): KB v National Health Service Pensions Agency (Case C-117/01) [2004] ICR 781, ECJ
1974 **Health and Safety at Work etc Act** (c 37)
ss 3, 6: R (Junttan Oy) v Bristol Magistrates' Court [2002] ICR 1523, DC; [2003] ICR 1475, HL(E)
ss 3(1), 33(1)(a), 40: R v Davies (David Janway) [2003] ICR 586, CA
s 20(2)(j): R (Wandsworth London Borough Council) v South Western Magistrates' Court [2003] ICR 1287, DC
s 22 (as amended): Railtrack plc v Smallwood [2001] ICR 714
Solicitors Act (c 47)
s 35: Barnes v Leavesley [2001] ICR 38, EAT
Trade Union and Labour Relations Act (c 52)
Sch 1, para 16(1): Duthie v Bath and North East Somerset Council [2003] ICR 1405, EAT
1975 **Sex Discrimination Act** (c 65)
s 1(1): Ashton v Chief Constable of West Mercia Constabulary [2001] ICR 67, EAT
Southwark London Borough Council v Whillier [2001] ICR 142, EAT
ss 1(1), 5(3): Pearce v Governing Body of Mayfield Secondary School [2002] ICR 198, CA; [2003] ICR 938, HL(E)
ss 1(1), 63A(2) (as amended and inserted): University of Huddersfield v Wolff [2004] ICR 828, EAT

1975 **Sex Discrimination Act**—*continued*
ss 1(1)(a), 5(3): Macdonald v Ministry of Defence [2001] ICR 1, EAT(Sc); [2002] ICR 174, Ct of Sess; [2003] ICR 938, HL(Sc)
s 1(1)(b): Lord Chancellor v Coker [2001] ICR 507, EAT; [2002] ICR 321, CA
s 1(1)(b): Whiffen v Milham Ford Girls' School [2001] ICR 1023, CA
ss 1(1)(b), 9(2): Allonby v Accrington and Rossendale College [2001] ICR 1189, CA
ss 1(2), 56A(10), 63A (as inserted), 74(2): Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205, EAT
ss 2A, 41(3), 82 (as inserted and amended): Croft v Royal Mail Group plc (formerly Consignia plc) [2003] ICR 1425, CA
s 6(2): Halfpenny v IGE Medical Systems Ltd [2001] ICR 73, HL(E)
Rhys-Harper v Relaxion Group plc [2001] ICR 1176, CA; [2003] ICR 867, HL(E)
D'Souza v Lambeth London Borough Council; Jones v 3M Healthcare Ltd [2003] ICR 867, HL(E)
Metropolitan Police Service v Shoebridge [2004] ICR 1690, EAT
ss 7, 7B(2)(a) (as inserted): Chief Constable of the West Yorkshire Police v A (No 2) [2002] ICR 552, EAT
s 7(2)(b): Chief Constable of the West Yorkshire Police v A (No 2) [2003] ICR 161, CA; [2004] ICR 806, HL(E)
s 10(1) (as amended): Saggar v Ministry of Defence [2004] ICR 1708, EAT
ss 11(1) (as amended): Dave v Robinska [2003] ICR 1248, EAT
s 13(1): Secretary of State for Scotland v Mann [2001] ICR 1005, EAT(Sc)
ss 16(1), 32(1), 75: Chief Constable of Bedfordshire Police v Liversidge [2002] ICR 1135, CA
s 17(1): Chief Constable of Cumbria v McGlennon [2002] ICR 1156, EAT
ss 17(1), 41(2): Chief Constable of Kent County Constabulary v Baskerville [2003] ICR 1463, CA
s 41(2): Yearwood v Comr of Police of the Metropolis [2004] ICR 1660, EAT
s 63A (as inserted): Nelson v Carillion Services Ltd [2003] ICR 1256, CA
Chamberlin v Emokpae [2004] ICR 1476, EAT
ss 65(1), 66(1): Hall v Woolston Hall Leisure Ltd [2001] ICR 99, CA
s 76(6)(b): Comr of Police of the Metropolis v Hendricks [2003] ICR 530, CA

1976 **Resale Prices Act** (c 53)
ss 14, 17: In re Medicaments and Related Classes of Goods (No 3) [2001] ICR 306, RP Ct

Race Relations Act (c 74)
ss 1(1)(a), 32(1): Sidhu v Aerospace Composite Technology Ltd [2001] ICR 167, CA
ss 1(1)(a)(b), 3(4): Hanly v Norinchukin International plc [2003] ICR 1416, EAT
s 1(1)(b): Lord Chancellor v Coker [2001] ICR 507, EAT; [2002] ICR 321, CA
s 2(1)(a): Brown v TNT Express Worldwide (UK) Ltd [2001] ICR 182, CA
s 2(1)(a): Chief Constable of the West Yorkshire Police v Khan [2001] ICR 1065, HL(E)
s 3(4): Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting [2002] ICR 646, CA
ss 4, 12, 78(1): Patterson v Legal Services Commission [2004] ICR 312, EAT and CA
ss 4(1), 13 (as substituted): Hussain v King's College Hospital NHS Trust [2002] ICR 1433, CA
s 4(1)(2): Rhys-Harper v Relaxion Group plc; D'Souza v Lambeth London Borough Council; Jones v 3M Healthcare Ltd [2003] ICR 867, HL(E)
s 4(2)(b)(c): Ahmed v Governing Body of the University of Oxford [2003] ICR 733, CA
Governing Body of Addey and Stanhope School v Vakante [2003] ICR 290, EAT
Vakante v Governing Body of Addey and Stanhope School (No 2) [2004] ICR 279, EAT
ss 4(2)(c), 68(1)(7)(b): Derby Specialist Fabrication Ltd v Burton [2001] ICR 833, EAT
ss 7, 78: North Essex Health Authority v David-John [2004] ICR 112, EAT
s 10(1) (as amended): Saggar v Ministry of Defence [2004] ICR 1708
s 11(1): Medical Protection Society v Sadek [2004] ICR 1263, CA
ss 12, 20(1), 25: Ali v McDonagh [2002] ICR 1026, CA
ss 12, 54(2), 68(7): Chaudhary v Royal College of Surgeons [2003] ICR 1510, CA
s 32(2): Yearwood v Comr of Police of the Metropolis [2004] ICR 1660, EAT
s 33(1): Anyanwu v South Bank Student Union (Commission for Racial Equality intervening) [2001] ICR 391, HL(E)
Hallam v Avery [2001] ICR 408, HL(E)
s 54: Ahuja v Inghams (Accountants) [2002] ICR 1485, CA
ss 54(1), 56(1), 57: Essa v Laing [2003] ICR 1110, EAT; [2004] ICR 746, CA
s 68: Southwark London Borough Council v Afolabi [2003] ICR 800, CA
s 68(6): Apelogun-Gabriels v Lambeth London Borough Council [2002] ICR 713, CA
s 68(7)(b): Comr of Police of the Metropolis v Hendricks [2003] ICR 530, CA
s 78(1): Mingeley v Pennock (trading as Amber Cars) [2004] ICR 727, CA

1978 **Interpretation Act** (c 30)
s 7: Zietsman (trading as Berkshire Orthodontics) v Stubbington [2002] ICR 249, EAT

1978 **Interpretation Act**—*continued*
s 7: Scotford v SmithKline Beecham [2002] ICR 264, CA
Gdynia America Shipping Lines (London) Ltd v Chelminski [2004] ICR 1523, CA
s 18: R (Junttan Oy) v Bristol Magistrates' Court [2003] ICR 1475, HL(E)
Employment Protection (Consolidation) Act (c 44)
ss 42(1), 44 (as substituted), 56: Halfpenny v IGE Medical Systems Ltd [2001] ICR 73, HL(E)
1979 **Pneumonconiosis etc (Workers' Compensation) Act** (c 41)
ss 1(1), 2(1): Ballantine v Newalls Insulation Co Ltd [2001] ICR 25, CA
1980 **Limitation Act** (c 58)
ss 11, 33: Allen v British Rail Engineering Ltd [2001] ICR 942, CA
1981 **Supreme Court Act** (c 54)
s 37(1): Turner v Grovit [2002] ICR 94, HL(E)
1982 **Civil Jurisdiction and Judgments Act** (c 27)
s 2(1), Sch 2, art 3(1): Turner v Grovit [2002] ICR 94, HL(E)
1984 **County Courts Act** (c 28)
s 51(1): Fairchild v Glenhaven Funeral Services Ltd [2002] ICR 412, CA
Police and Criminal Evidence Act (c 60)
s 54(9): Chief Constable of the West Yorkshire Police v A (No 2) [2004] ICR 806, HL(E)
1986 **Insolvency Act** (c 45)
s 19(5)(6) (as amended): In re FJL Realisations Ltd [2001] ICR 424, CA
ss 283(1), 306, 436: Grady v Prison Service [2003] ICR 753, EAT and CA
Khan v Trident Safeguards Ltd [2004] ICR 1591, CA
1988 **Income and Corporation Taxes Act** (c 1)
s 193(1), Sch 12, para 3(2A) (as inserted): Clark v Perks (No 2) [2002] ICR 302, CA
s 600(1)(2): Venables v Hornby [2002] ICR 81; [2003] ICR 186, CA; [2004] ICR 42, HL(E)
Education Reform Act (c 40)
Sch 3, para 8(1)(9): R (McNally) v Secretary of State for Education and Employment [2002] ICR 15, CA
1989 **Local Government and Housing Act** (c 42)
s 7(1): Archibald v Fife Council [2004] ICR 954, HL(Sc)
1992 **Social Security Administration Act 1992** (c 5)
ss 170(4), 172(1), 173(1)(b): Howker v Secretary of State for Work and Pensions [2003] ICR 405, CA
Trade Union and Labour Relations (Consolidation) Act (c 52)
s 146(1): Southwark London Borough Council v Whillier [2001] ICR 142, EAT; [2001] ICR 1016, CA
ss 163, 164: Dowling v M E Ilic Haulage [2004] ICR 1176, EAT
s 178: Prison Service v Bewley [2004] ICR 422, CA
s 188 (1)(1A) (as substituted): MSF v Refuge Assurance plc [2002] ICR 1365, EAT
s 188(4)(7) (as amended): GMB v Amicus [2003] ICR 1396, EAT
s 189 (as amended): Susie Radin Ltd v GMB [2004] ICR 893, CA
ss 189(2)(3), 192: Howlett Marine Services Ltd v Bowlam [2001] ICR 595, EAT
ss 219(1), 226A(2)(c)(3A) (as inserted and amended), 244(1): Westminster City Council v UNISON [2001] ICR 1046, CA
ss 226A(2)(3A), 234A(3)(5A) (as inserted and amended): London Underground Ltd v National Union of Rail, Maritime & Transport Workers [2001] ICR 647, CA
ss 227(1), 232A, 232B (as inserted), 244(1): P (A Minor) v National Association of School Masters/Union of Women Teachers [2001] ICR 1241, CA; [2003] ICR 386, HL(E)
s 296(1)(b), Sch A1, para 1 (as inserted): R (British Broadcasting Corpn) v Central Arbitration Committee [2003] ICR 1542
Sch A1, paras 11, 19 (as inserted): R (Kwik-Fit (GB) Ltd) v Central Arbitration Committee [2002] ICR 1212, CA
1993 **Pension Schemes Act** (c 48)
ss 71(1)(2)(3), 72(1), 74(1), 180: Universities Superannuation Scheme Ltd v Simpson [2004] ICR 1426
ss 102(2), 108: BEC Pension Trustee Ltd v Sheppeck [2002] ICR 1343
s 146(4)(b) (as substituted): R (Britannic Asset Management Ltd) v Pensions Ombudsman [2003] ICR 99, CA
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BREACH OF CONTRACT

Employees brought claims for breach of contract in relation to their employers' refusal to pay discretionary bonuses which had been decided on by the employers but which were withheld after the employees gave notice to terminate their employment. An employment tribunal upheld the claims on the ground that, the employers having exercised their discretion in the employees' favour, it had been unreasonable to change their mind and in breach of the implied term not to carry out an act calculated to undermine trust and confidence between employer and employee.

JUDGE PETER CLARK, allowing an appeal by the employers and remitting the matter for rehearing, said that in *Clark v Nomura International Plc* (unreported) 6 September 2000, Burton J had recognised that an employer's discretion to pay a bonus was not unfettered. The decision not to pay must not be capricious. Burton J had approached the matter on the footing that an employer could not exercise his discretion, by refusing to pay a bonus, perversely in the *Wednesbury* sense. That was not to say that such an employer acted unreasonably but that no reasonable employer would have reached the same conclusion acting in accordance with his contractual obligations. The employment tribunal had approached the implied term on the basis that a reasonable employer would not have withheld the bonuses, which had been determined but not declared to the employees, on the ground that they were shortly to leave the employers' employment. That was an impermissible approach. The discretion vested in the employers had to be exercised in good faith and not capriciously. The question of whether the employers acted in breach of the implied term was a decision for the fact-finding tribunal once all the necessary primary facts had been found.

Manor House Healthcare v Hayes; 16 October 2000; EAT/1196/99
EAT: Judge Peter Clark, Mr P Dawson and Mrs A Gallico

DISABILITY DISCRIMINATION

The applicant, who had a history of mental illness, had his application to become a trainee voluntary adviser with a citizens' advice bureau rejected. On his complaint of disability discrimination under section 4(1)(a) of the Disability Discrimination Act 1995, an employment tribunal found that it had no jurisdiction to hear the complaint, because the applicant had not applied for "employment" as defined by section 68 of the Act, since the volunteer adviser post and the training programme did not fall within that definition.

JUDGE WILKIE QC, allowing an appeal by the applicant, said that any tribunal, looking at the document the applicant would have been required to sign and concluding that there was no obligation on either party, must have either misdirected itself as to the law or completely failed to understand the document. Further, by apparently regarding the absence of pay as the crucial factor, rather than one of a number of factors to be weighed in the balance, the tribunal erred in law. In saying that expenses could not equate to pay or remunerated employment, while no doubt accurately categorising expenses as opposed to payment and remuneration, the tribunal, in so far as it was seeking to rely on that as supporting a conclusion that it was not a contractual agreement with mutually binding obligations, was again misdirecting itself. But the mere fact that the document amounted to a legal binding contract if entered into did not in itself mean that the tribunal had jurisdiction, because the contract had to be either a contract of service or a contract personally to do any work. The tribunal had not addressed the question whether it was such a contract or was no more than a contract simply to undergo training in the manner prescribed. To come to a conclusion on that issue, the tribunal would have to receive evidence of what happened under such an agreement in terms of the mix between formal training, supervision and work performed during the training period. Accordingly, the matter would have to be remitted. Should the employment tribunal conclude that the agreement was a contract for training rather than a contract within section 68, the applicant would seek to argue that the refusal of the applicant's application was contrary to section 4(1)(a) of the 1995 Act, in that admission to the training programme was part of the "arrangements which [the citizens' advice bureau] makes for the purpose of determining to whom [it] should offer employment". The words of section 4(1)(a) were wide, and, if arrangements were to determine to whom employment generally should be offered, such a training programme was capable of being covered by the subsection. The satisfactory completion of the programme was a first stage in a potentially seamless process at the end

of which was an offer of employment as a voluntary adviser. Whether that was the case would depend on the evidence.

Murray v Newham Citizens' Advice Bureau; 6 July 2000; EAT/1096/99
EAT: Judge Wilkie QC, Mr J R Crosby and Miss G Mills

EMPLOYEE

The applicant responded to an advertisement to work with M Ltd and worked at its plant, subject to its control, until M Ltd suspended the applicant and then "decided to terminate his assignment". On the applicant's complaint of unfair dismissal, M Ltd submitted that the applicant was an employee of MC Ltd and a "temporary worker" for M Ltd under a contract for services. MC Ltd carried on business in the nature of an employment agency, and supplied selected individuals to M Ltd pursuant to an "operating agreement for the supply of temporary workers" which required it to conduct a recruitment process specified by M Ltd. The employment tribunal decided, as a preliminary issue, that the applicant was an employee of M Ltd.

LINDSAY J, dismissing an appeal by M Ltd, said that, since M Ltd had limited its argument on appeal to the second component of a contract of service, namely control, the principal question was whether the employment tribunal erred in law in concluding that as between M Ltd and the applicant there existed the right of the former to control the latter to a degree sufficient to enable the tribunal properly to regard M Ltd as the employer and the applicant as its employee. Reference was made to dicta of MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497, 515. Although MacKenna J spoke of control in terms of *rights*, there was no good reason to ignore practical aspects of control that fell short of direct legal rights. The employment tribunal had held that the control of what the applicant did on a day to day business lay with M Ltd. It would be unreal to ignore the existence of that practical degree of control simply because a direct legal right did not lie in M Ltd under a contract it had made with the applicant. It did not necessarily disprove A's control to a given degree by proving that B had similar or greater powers of control. The sanctions available against the applicant were so akin to the sanction an employer would have against an employee that one could not say that the control exercisable by M Ltd was not "in a sufficient degree to make one party the master and the other his servant". There was no error of law in the employment tribunal decision.

Motorola Ltd v Davidson; 18 May 2000; EAT/46/00
EAT(Sc): Lindsay J, Mr A J Ramsden and Mrs T Marsland

EVIDENCE

During the hearing of complaints by two employees that they had been unfairly dismissed on the ground of misconduct pursuant to statements made by fellow employees given on the basis that the makers would remain anonymous, the employment tribunal refused to disallow a question to be put to an employer's witness as to the possible identity of one of the statement makers. The tribunal also indicated that it was prepared to compel the production of documents understood to be the statements in question.

LORD JOHNSTON, allowing an appeal by the employer, said that the issue created a clash of two irreconcilable principles: on the one hand, the need for there to be a full and fair investigation of the case on both sides, and, on the other hand, the legitimate attempt by the employer to honour a pledge given to employees who had given statements in confidence. From *Science Research Council v Nasse* [1979] ICR 921 it had to be taken that there was no absolute in either respect. That case would seem to suggest that, if possible, compromises should first be attempted. *Hussain v Elonex Plc* [1999] IRLR 420 pointed to the fundamental need in terms of natural justice for the employee to know the case he faced and, if that could not be done without handing over confidential documents, that must be done. It did not follow, however, that such was necessary if by other means the employee was aware of the case against him. In the present case the tribunal had reached its decisions on the basis that to do otherwise was to delegate or abandon the judicial duty to investigate the matter, in deference to a decision of the employer. Whether an attempt had been made to consider whether parts of the statements should be deleted was not entirely clear, but the appeal tribunal had been told that it was not practicable to do so without destroying the substance of the statements. Accordingly, a compromise, which should if at all possible be effected, did not appear to be possible. The tribunal had misdirected itself by determining the matter solely on the question of abrogation or abandonment of the judicial role. Where, in a case such as the present, an employer had given adequate notice to employees of the case against them by other means, it was legitimate for the employer to honour a pledge of anonymity if a compromise was not possible. The result might be that the best evidence was not led, but no doubt the tribunal would take that into account in considering how far the employer had succeeded in discharging the onus of establishing the reason for dismissal and the adequacy of the investigation into that reason.

Charnos Plc v Donnelly; 27 July 2000; EAT/334/00
EAT(Sc): Lord Johnston, Mr A J Ramsden and Mr R P Thomson

ILLEGALITY

From 1996 until June 1997 the applicant, at his own request, worked ostensibly as a consultant, presenting invoices and receiving his salary gross and paying national insurance contributions as a self-employed person, while in fact working as an employee. From July 1997 until his dismissal in December 1998 he was paid with deductions made at source. On his complaint of unfair dismissal, the employment tribunal found, as a preliminary point, that the documents did not show that tax and insurance contributions had been avoided; that the contract of employment was not tainted with illegality; and that the applicant was entitled to rely on the period before July 1997 in computing his period of continuous employment, in order to pursue his complaint.

JUDGE REID QC, allowing an appeal by the employers, said that payment of wages free of tax did not necessarily render a contract of employment illegal and void, but the manner of performance, for example, the production of false documents, might do so. Whether an employee was affected by such illegality would depend on the state of his knowledge. On the face of the documents before the employment tribunal, contrary to the finding of that tribunal, the applicant had not conducted his tax affairs properly. The documents disclosed that he had failed to make tax returns and had paid tax on the basis not of his earnings but of a much lower income. It was also apparent that he paid far less by way of national insurance contributions than he should have done on the basis of his earnings as an employed person. The tribunal's findings were unsustainable. The material before the appeal tribunal was consistent only with an intention to defraud the revenue by purporting to be self-employed when he was in fact employed. There was no evidence that he had ever paid the tax he should have done. The tribunal's decision must be discharged, but, since there might have been material not rehearsed in the tribunal's summary reasons which had influenced their decision, the case would be remitted for rehearing.

Beauvale Furnishings Ltd v Chapman; 29 November 2000; EAT/79/00
EAT: Judge Reid QC, Mr B Fitzgerald and Ms G Mills

TIME LIMIT

A complaint that the applicant had been unlawfully expelled from his union, contrary to section 174(1) of the Trade Union and Labour Relations (Consolidation) Act 1992, was presented to an employment tribunal more than six months after his expulsion. The tribunal held that he was entitled to pursue his claim on the ground that, for the purposes of section 175, it was "not reasonably practicable" for him to have presented the complaint in time when he had been pursuing an internal appeal in accordance with the union's procedures pursuant to advice given him by a citizens' advice bureau.

SIR CHRISTOPHER BELLAMY QC, allowing an appeal by the union and dismissing the complaint, said that the words "not reasonably practicable" were, in principle, to be given the same meaning whenever they appeared in an equivalent context in comparable legislation. The wording of section 175(b) of the 1992 Act was the same as section 111(2)(b) of the Employment Rights Act 1996, which dealt with the time limit in cases of unfair dismissal. That section was itself worded identically to its predecessor sections. Parliament could have, but had not, chosen to adopt different words as it did when adopting the wider test provided under section 68(6) of the Race Relations Act 1976, which provided that a complaint presented out of time might none the less be considered by a tribunal if it considered that it was "just and equitable" to do so. Moreover, Parliament must be presumed to have known, when enacting the 1992 Act, of the meaning given to the words "not reasonably practicable" by previous decisions of the courts. It followed that the employment tribunal had given insufficient weight to previous decisions concerning the interpretation of those words in the context of time limits under other statutes. The Employment Appeal Tribunal had held in *Bodha v Hampshire Area Health Authority* [1982] ICR 200, 205 that the fact that an employer's internal appeal procedure had not been exhausted did not render it "not reasonably practicable" to present a complaint within the time limit. As regards the tribunal's reliance on "inaccurate advice" the applicant was said to have obtained from the citizens' advice bureau, the fact that an applicant received incorrect advice from a citizens' advice bureau or other adviser did not in law justify the conclusion that it was "not reasonably practicable" to present a complaint within the relevant time limit.

GMB v Hamm; 15 November 2000; EAT/246/00
EAT: Sir Christopher Bellamy QC, Mr J R Crosby and Mr G H Wright

CONSTRUCTIVE DISMISSAL

An employee, who went on sick leave suffering from anxiety and depression following a decision to demote her, resigned after her employers insisted that her appeal against the demotion would not be heard until she was fit to return to work. An employment tribunal rejected her claim that she had been constructively dismissed on the ground that it was a reasonable response by the employers to delay the appeal until she was fit and they were not in breach of the implied term of mutual trust and confidence.

BELL J, allowing an appeal by the employee, said that for there to be a constructive dismissal the delay in the appeal process, which was the sole reason for the employee's resignation, had to be a significant breach of contract entitling her to treat herself as discharged from her contract of employment. The test of breach of the implied term was whether the employer had acted in a manner calculated or likely to destroy or undermine the relationship of trust and confidence. While that test was contractual, the question of whether the employer had acted reasonably was not wholly irrelevant. It might be of evidential value in deciding whether there had been a breach of the implied term by the employer and whether any breach was sufficiently serious to entitle the employee to consider herself as discharged. The tribunal had thought it useful to ask itself whether the employers had acted reasonably, when judging whether the delay put the employers in breach of the implied term and to such a degree as to justify resignation. It was entitled to take that approach and to decide that the employers acted reasonably and were not in breach of the implied term. However, the employee's case was that the employers' delay in hearing her appeal was a significant breach of an express term of her contract, which provided that appeals had to be heard as soon as was "practicable". The word "practicable" was not to be taken to mean simply "capable of being done". Adopting what was said by May LJ in *Palmer v Southend-on-Sea Borough Council* [1984] ICR 372, 384H, and reading "practicable" as the equivalent "feasible" was a good working approach to its meaning and application. The tribunal had misdirected itself in asking whether the employers had acted reasonably in not hearing the appeal by the time the employee resigned, though that might have been because of confusion as to the applicability of the express term. The matter would be remitted to the same tribunal to decide whether the employers were in breach of the express term and, if so, whether the nature of the breach was sufficiently serious to amount to constructive dismissal.

Devoy v World Duty Free (Europe) Ltd; 27 November 2000; EAT/59/00
EAT: Bell J, Mr D J Hodgkins and Mr H Singh

COSTS

An employment tribunal made an order, under rule 12(3)(c) of the Employment Tribunals Rules of Procedure 1993, for the applicant to pay the costs incurred by the respondent in respect of the preparation and conduct of the full merits hearing of his complaint without making an inquiry as to his means.

JUDGE WILSON, dismissing an appeal by the applicant, said that in *Benyon v Scadden* [1999] IRLR 700 the appeal tribunal had held, contrary to the view expressed in *Omar v Worldwide News Inc* [1998] IRLR 29, that there was no requirement for a tribunal to look at an applicant's personal means before making an order for costs against him. Indeed, the appeal tribunal in *Benyon* was unable to agree with the decision in *Omar* that only in exceptional circumstances should a tribunal consider the means of a party's trade union in making an order for costs. That would place an unjustified fetter on the tribunal's discretion to award costs, given the unrestricted terms in which the discretion was conferred by the Rules. It was preferable to follow the *Benyon* line because the *Omar* facts were not present and because, when dealing with the matter, the chairman of the employment tribunal had said that it was submitted that, with one or two minor exceptions, the applicant's complaints were completely misconceived and that the applicant's representative had received in excess of 10 warnings as to his conduct of the applicant's case. The applicant had been present at the hearing and his representative was to be taken to have had the applicant's authority in the way he conducted the proceedings.

Lilburne-Byford v Essex County Council; 13 November 2000; EAT/264/98
EAT: Judge H Wilson, Mr J R Crosby and Mr N D Willis

DISCOVERY

An applicant's request for further and better particulars of the notice of appearance was refused by an employment tribunal chairman on the ground that the respondent's case was sufficiently well pleaded. Further requests by the applicant for documents were also refused on the ground that they were not necessary to dispose of the issue between the parties.

JUDGE WILKIE QC, dismissing an appeal by the applicant, said that the applicant contended that, while the tribunal chairman had acted within the powers of her discretion, the review of such discretion

by the appellate court was unfettered, and he referred to *British Library v Palyza* [1984] IRLR 306, para 4. On the face of it, the case was authority on the basis of which it could be argued that, at appellate level, the appeal tribunal was free to open issues of discovery and the request for further particulars as if taking the decision afresh. The appeal tribunal had, however, been persuaded by the respondent's review of the relevant authorities that it did not have a free hand to review the decision of the chairman in respect of either matter and was constrained to interfere only on the grounds set out, respectively, in *Bastick v James Lane (Turf Accountants) Ltd* [1979] ICR 778, 782 and *Noorani v Merseyside TEC Ltd* [1999] IRLR 185, para 32. As to the principles on which the question of discovery, particularly in discrimination cases, was concerned, the test was that the tribunal was satisfied that it was necessary to order certain documents to be disclosed and inspected in order fairly to dispose of the proceedings. The chairman's approach had been correct in law and the specific decisions she made were such as a reasonable tribunal, properly directing itself, could have made.

Barber v Humphreys; 27 September 2000; EAT/560/00
EAT: Judge Wilkie QC, Mr D J Hodgkins and Ms B Switzer

SOVEREIGN IMMUNITY

On a complaint of unfair dismissal by an employee of a sovereign state, who worked at its embassy as a driver/interpreter, the employment tribunal decided that the respondent government was not immune from suit and found that the employee had been unfairly dismissed.

JUDGE PETER CLARK, allowing an appeal by the respondent government and dismissing the complaint, said that it was common ground that the question for the tribunal was whether the applicant employee had been a member of "the administrative and technical staff" of the mission within article 1(f) of the Vienna Convention on Diplomatic Relations (1961), set out in Schedule 1 to the Diplomatic Privileges Act 1964, for the purposes of section 16 of the State Immunity Act 1978. It was unfortunate that although the employment tribunal had been referred to *Ahmed v Government of the Kingdom of Saudi Arabia* [1996] ICR 25 it had not been referred to the preceding case of *Arab Republic of Egypt v Gamal-Eldin* [1996] ICR 13. In *Gamal-Eldin* the Employment Appeal Tribunal, at p 23E, had held that although the applicants, who were employed as drivers, formed part of the administrative and technical staff of the mission. There was no factual distinction from the present case. The employment tribunal had given no reasons to explain why they had concluded that the applicant was not a member of the administrative and technical staff on the facts as found. That was an error of law. As it was abundantly clear that such staff included a driver employed to transport nationals of the respondent state arriving by air and to act as their translator, the appropriate course was hold that the respondent had immunity from suit and to dismiss the applicant's complaint.

Government of the Kingdom of Saudi Arabia v Nasser; 26 July 2000; EAT/672/99
EAT: Judge Peter Clark, Mr P Dawson and Mrs R A Vickers

STAY OF PROCEEDINGS

An employee who claimed to have contracted repetitive strain injury and carpal tunnel syndrome as a result of his work brought a complaint, in August 1998, of disability discrimination alleging that his employer had failed to make reasonable adjustments as required by section 6 of the Disability Discrimination Act 1995. In July 1999 the proceedings were stayed pending the issue of High Court proceedings by the employee claiming damages for personal injury. In April 2000 the tribunal called a directions hearing and the complaint was listed for hearing in September 2000. The following month the employee issued proceedings in the High Court and sought a stay of the tribunal proceedings to which the employers consented. The tribunal chairman refused a stay on the ground that it was not in the interests of justice that the complaint should be further delayed.

JUDGE PETER CLARK, allowing an appeal by the employee and substituting an order staying the tribunal proceedings, said that the appeal was supported by the employers who submitted that the employee's two claims arose out of the same facts. The appeal tribunal had no general power of review of employment tribunal interlocutory orders and could only interfere where an error of law was made out. In practice that meant an appellant had to pass the *Wednesbury* test. It was submitted, first, that, although the tribunal was entitled, indeed obliged in the interests of the proper administration of justice, to consider the question of delay in disposing of proceedings, the chairman had, on the face of his reasons, failed to take into account a relevant factor, namely, that the respondent employers had consented to a stay: see *First Castle Electronics Ltd v West* [1989] ICR 72, 77E. There was, it was submitted, no prejudice to the parties by the delay when both agreed that it was appropriate that the High Court proceedings should be heard first. Secondly, it was submitted that the chairman had misunderstood the potential embarrassment to the High Court judge hearing the personal injury action if material findings of fact, binding on him under

the issue estoppel principle, were made by the employment tribunal. In the judgment of the appeal tribunal, both submissions were made good, and the chairman's decision was flawed as a matter of law.

Tahir v Cyberlife Technology Ltd; 27 July 2000; EAT/871/00
EAT: Judge Peter Clark, Lord Davies of Coity and Mrs D M Palmer

UNFAIR DISMISSAL

An employment tribunal dismissed an employee's complaint that he had been unfairly dismissed for alleging that his employers had infringed a statutory right, within the meaning of section 104(1)(b) of the Employment Rights Act 1996, because he was dismissed after he had made a complaint under the employers' internal grievance procedure that his manager had refused to allow him time off for public duties contrary to section 50(2) of the Act.

BELL J, dismissing an appeal by the employee, said that the tribunal found that the reason for the employee's dismissal was his carrying out of various activities on a day's sick leave. It was common ground that the employee's use of the grievance procedure to challenge his manager's refusal to allow him more time off for his public duties amounted to an allegation that the employers had infringed a right of his which was a relevant statutory right for the purpose of section 104(1)(b). It was not contended that attending to public duties while on sick leave could amount to the assertion of a statutory right. The statutory scheme relating to unfair dismissal in Part X of the 1996 Act was different to that of race and sex discrimination and victimisation. The tribunal had to focus on "the reason" for dismissal and not the "but for" test applied in discrimination cases. The wording of section 104(1) was plain and it was difficult to do more than rehearse its express terms. It was argued that *King v Great Britain-China Centre* [1992] ICR 516 laid down an approach to the evidence in cases such as the present and that the tribunal should not say: "There is no direct evidence; that is the end of it." The appeal tribunal could not accept that submission. The guidance in that case was clearly useful in discrimination cases. But there were real differences between cases of alleged race discrimination where the complainant might be able to prove that he had been treated "less favourably" but had difficulty showing that that treatment was on racial grounds and the relatively simple question of the reason for dismissal. It was clearly common sense for the employment tribunal to examine the reason given by the employers for the employee's dismissal. The tribunal had clearly done so and considered whether it should draw the inference from the facts that the employee's assertion of his statutory right led to his dismissal. It did not infer that that was the reason, or principal reason, for the dismissal, and, given the fact that after the employee had made his complaint about time off he had compromised his grievance in agreed terms, it was entitled to come to the view it did.

Pennington v Legal Aid Board; 11 December 2000; EAT/1047/99
EAT: Bell J, Mr B Gibbs and Mr A E R Manners

UNFAIR DISMISSAL

Following an assault by a neighbour in January 1997, an employee went on sick leave. At a review hearing in December 1997 it was confirmed that she was suffering from clinical depression. She was dismissed on the grounds of her length of absence and that no time scale as to her recovery had been given. At an internal appeal the employee provided medical evidence stating that she would be fit to resume work on 30 May 1998, but the appeal hearing declined to take notice of it and confirmed her dismissal. An employment tribunal dismissed her complaint of unfair dismissal, finding that she had been fairly dismissed by reason of capability.

KEENE J, allowing an appeal by the employee, said that, on the face of it, the medical evidence was clearly relevant to the issues being considered on the internal appeal. The employment tribunal had regarded its exclusion as justified, and indeed required, by the employer's guidelines on appeals against dismissal. The appeal tribunal was of the view that those guidelines did not exclude new evidence, whether the label attached to the process was one of appeal or review. But, in any event, the normal principle was that new evidence was admissible in such internal appeals, and that must inform the construction of the guidelines. Generally, at an appeal hearing the employer would be expected to take account of anything relevant to the decision to dismiss. Putting it at its very lowest, it would take clear language in the written disciplinary procedures of an employer to justify shutting one's eyes to such further information, and it was doubtful whether even the language of such procedures could justify such an approach. Relevant new information coming into the possession of an employer on the topic of reasonableness before the appeal or review decision had been arrived at should generally be taken into account. To do otherwise would seem to fall outside the range of responses of a reasonable employer. The employment tribunal had fallen into error in misconstruing the guidelines and concluding that the appeal panel had been right to exclude the medical evidence, which was highly material to its decision, from its consideration.

Valton v Hackney London Borough Council; 14 July 2000; EAT/410/99
EAT: Keene J, Mrs A Gallico and Ms G Mills

CONTRACT OF EMPLOYMENT

An employment tribunal found that an employee's complaint that she had not been provided with a written statement of particulars of employment, in compliance with section 1 of the Employment Rights Act 1996, was well-founded, but went on to say that as her employment had terminated the tribunal made no determination in that respect.

JUDGE WILCOX, allowing an appeal by the employee, said that no formal contract of employment setting out the material terms and conditions was given to the employee in the requisite time, and after working for the employer for 12 weeks she was given one week's notice, but the employment tribunal rejected her complaint that she was dismissed for asking for her contract. There was, however, an absolute right under the statute to the terms of the contract. They had not been provided and the tribunal ought to have directed that they should be provided or found terms, certainly as to notice. The matter would be remitted to the same tribunal to consider what the contract was.

Young v Timbmet Ltd; 13 July 2000; EAT/667/99
EAT: Judge David Wilcox, Mr D J Jenkins and Mr K M Young

COSTS

An employment tribunal, having inquired into an applicant's means, decided that the applicant had acted unreasonably in failing to attend a hearing and made a costs order against him under rule 12(1) of the Employment Tribunals Rules of Procedure 1993.

MR RECORDER BURKE QC, dismissing an appeal by the applicant, said that the applicant submitted that, in deciding that he had the means to pay costs before embarking on their decision as to whether he had acted unreasonably, the tribunal had, impermissibly, considered the applicant's means as part of their consideration as to whether or not he had behaved unreasonably. There was no express requirement in the rules that an employment tribunal should take a party's means into account in deciding whether to make a costs order. In *Beynon v Scadden* [1999] IRLR 700 the appeal tribunal had said that its previous decisions in *Wiggin Alloys Ltd v Jenkins* [1981] IRLR 275 and *Omar v Worldwide News Inc* [1998] IRLR 291 could not be taken as introducing any fetters on the broad jurisdiction which rule 12 conferred on employment tribunals and indicated that each case depended on its own circumstances and that it was a matter for the tribunal to decide whether or not to investigate means. Accordingly, there was nothing in the authorities to support the proposition that it was wrong in principle for a tribunal to consider means before deciding the question of reasonableness. The question of means was, in an ordinary case, likely to be capable of a simple answer after a simple investigation, and in many cases, if it was shown by such an investigation that there were no means, the tribunal might well not go on to consider the more difficult question as to whether the person against whom the costs order was sought had acted unreasonably. There was, therefore, good practical sense in looking at the question of means before the question of reasonableness, but it might be equally sensible, in a different case, to look at reasonableness before means, especially if it did not involve much investigation whereas the question of means might involve more investigation. In the present case there was no error of law in the tribunal having looked at means before reasonableness.

Zalzala v Sheffield University; 21 November 2000; EAT/976/99
EAT: Mr Recorder Burke QC, Mr D Norman and Ms H Pitcher

DISABILITY DISCRIMINATION

An employment tribunal found, as a preliminary issue, that, although the applicant suffered from dyslexia, he was able to carry out his normal day-to-day activities and was not disabled within the meaning of section 1 of the Disability Discrimination Act 1995.

JUDGE PUGSLEY, allowing an appeal by the applicant, said that, although the tribunal had correctly directed themselves as to the law, all the examples of day-to-day activities they had quoted were work-related and they had failed to carry out a widespread and comprehensive review of the definition of day-to-day activities as interpreted in the Guidance Notes. In *Goodwin v Patent Office* [1999] ICR 302 the appeal tribunal had made it clear that tribunals should adopt an investigative role and a purposive approach to the legislation. The tribunal did not appear to have carried out any balanced judgment of the applicant's day-to-day as opposed to work-related activities. The tribunal had defined the issues and set out a preliminary hearing. It would have been more helpful had the tribunal heard the whole case. Other matters might have thrown light on the fundamental question under consideration. Moreover, it would have saved time in the long run. Where there was an issue as to why the applicant was dismissed, hearing the evidence on that issue might very well throw light on whether the applicant was to be regarded as disabled and there was

likely to be a more penetrating analysis of what had happened. The matter would be remitted and the tribunal invited to consider looking at the overall case rather than dealing with it in discrete parts.

Hutton v A E Proctor Ltd; 18 December 2000; EAT/1319/99
EAT: Judge Pugsley, Mr D J Hodgkins and Mr A D Tuffin

DISABILITY DISCRIMINATION

An employee who suffered from chronic fatigue syndrome was allowed to return to work on a part-time basis by using his annual leave. An employment tribunal found that the loss of leave caused him considerable concern and that his distress was compounded by the employer's failure to provide him with adequate support from other employees. The tribunal held that, for the purposes of section 6(1) of the Disability Discrimination Act 1995, the arrangements made for his return to work placed the employee at a substantial disadvantage in comparison with persons who were not disabled, and they upheld his complaint of discrimination under section 5(2).

LORD JOHNSTON, dismissing an appeal by the employer, said that the employer submitted, on the issue of the reasonableness of particular steps it was said could have been taken, that, if the substantial cause of the employee's stress related to the annual leave problem, the step of acting up cover or job share would have little benefit. The issue before the tribunal was essentially one of fact and they were entitled to hold that a substantial disadvantage had been established by reason of the fact that support had not been given even if the issue of annual leave also contributed to the question of stress. While the employee had been off work the job had been filled and there was no reason for that not to have continued so long as he needed help. It was unreasonable for the employer not to take the relevant steps to provide support, since it obviously had the resources to do so but chose not to use them.

Midlothian Council v Elliot; 28 November 2000; EAT/624/00
EAT (Sc): Lord Johnston, Miss S B Ayre and Ms A E Robertson

EMPLOYMENT TRIBUNAL

At the conclusion of the hearing of an applicant's complaint of unfair dismissal the tribunal's decision to dismiss the complaint was given orally. The applicant's representative then orally requested "written reasons" or "full written reasons". Summary reasons only were given and the applicant's representative subsequently wrote to the tribunal saying that extended reasons had been requested but had not been received. The chairman took the view that there had been no request for extended reasons and he refused to provide them.

LINDSAY J, on an appeal by the applicant against the refusal to give extended reasons, said that, bearing in mind that written reasons albeit in summary form issued in any event under rule 10(3) of the Employment Tribunals Rules of Procedure 1993 and that what were now called extended reasons used to be called "full reasons", one could not describe as unreasonable the applicant's thought that a request for full written reasons or even for written reasons was a request for extended reasons, yet the employment tribunal chairman, not hearing the word "extended", had not unreasonably taken the view that there had been no request for extended reasons. That unfortunate but understandable misunderstanding should not of itself deny any appeal by the applicant. The appeal tribunal could either require extended reasons to be given or exercise its discretion to proceed with the appeal on the summary reasons. Without adequate information as to which course to prefer, the tribunal would take the unusual step of ordering the applicant's appeal to proceed on summary reasons with the chairman being requested to supply his notes of evidence and submissions, if within 14 days of the judgment being sent to the employment tribunal chairman he indicated that it was not now practicable to compose adequate extended reasons. If no such indication was given, the chairman would be directed to supply extended reasons within a further four weeks.

Turtle v Stead & Simpson; 26 October 2000; EAT/854/99
EAT: Lindsay J, Mr D J Hodgkins and Mr D J Jenkins

HOLIDAY PAY

In order to comply with regulations 13(1) and 16(1) of the Working Time Regulations 1998, an employer reduced all employees' hourly rates of pay to make provision for their holiday pay. Complaints by employees that the employer had made unauthorised deductions from wages were dismissed by the employment tribunal.

JUDGE WILCOX, allowing an appeal by the employees, said that the reduction in the hourly rate to fund the holiday pay had not been made with the consent or agreement of the employees. The tribunal had erred in law in concluding that the deductions from the employees' pay discharged the employer's liability under the 1998 Regulations to provide paid holidays. The tribunal had made a fundamental error by holding that under a contract of employment the employer could, without consent, unilaterally reduce

ntitlement to pay in order to fund holiday pay. Other considerations might arise if there was a consensual rrangement, but that was not the present case. The employer would be ordered to repay the deductions ade.

Davies v M J Wyatt (Decorators) Ltd; 13 July 2000; EAT/1262/99
EAT: Judge David Wilcox, Mr D J Jenkins and Mr K M Young

MISCONDUCT

An employment tribunal found an employee to have been unfairly dismissed for using the telephone for ersonal calls in breach of policy when over the period of a year she appeared to have made two or three alls a week for about seven minutes each, the total cost being estimated at £37.76. The employer was ound not to have followed a fair disciplinary procedure in dismissing her where, inter alia, she was ummarily interviewed without warning and a disciplinary process was instigated minutes after the nterview, dismissal following thereafter. The employee had over 13 years' service and no disciplinary natters on file.

BELL J, dismissing the employer's appeal, said that *Royal Society for the Protection of Birds v Croucher* [1984] ICR 604, a case of admitted serious dishonesty by a director, was authority for the roposition that there might be cases of admitted dishonesty in which it was not incumbent on the mployer to give the employee a warning or carry out a detailed investigation before deciding that the mployee should be dismissed. The employer contended that the employee's conduct was clearly ishonest, that there was no need for any warning or investigation and it was entitled to dismiss her on the asis of conduct which she admitted. That contention highlighted the error made by the employer in its riginal consideration of the employee's case. The employer equated the use of the phone for any personal eason with dishonesty, but the test of dishonesty was not simply objective. The best working test of what as dishonest was that propounded in *R v Ghosh* [1982] QB 1053, 1054 and involved a two-stage process: rst, to decide whether according to ordinary standards of reasonable and honest people what was done as dishonest; secondly, if so, to decide whether the person concerned must have realised that what she as doing was by those standards dishonest. It was not necessarily obvious that using the employer's elephone for personal calls was dishonest. The employer did not investigate the question of dishonesty. It ut the conduct into the same category, in effect, as stealing money. One could argue that a reasonable mployer would be entitled to regard what the employee admittedly did as dishonest, but even so it did not ean that the employer necessarily had to dismiss her. In all the circumstances the duty on the employer to ct fairly and reasonably required that it should investigate the seriousness of the offence in the particular ase. However, nothing the appeal tribunal had said was meant to indicate that an employee who used the mployer's telephone for personal calls was immune from properly conducted disciplinary action which ight result in dismissal.

John Lewis plc v Coyne; 7 December 2000; EAT/581/99
EAT: Bell J, Mr G H Wright and Mr K M Young

TIME LIMIT

An employment tribunal awarded an applicant damages for breach of contract on a complaint which ad been made after the expiry of the three-month time limit prescribed by article 7 of the Employment ribunals Extension of Jurisdiction (England and Wales) Order 1994 without considering whether it had ot been reasonably practicable to present the complaint in time and to extend time.

MR COMMISSIONER HOWELL QC, allowing an appeal by the employer, said that the employer ad not at any stage of the proceedings below resisted the claim on the ground that it was out of time and he applicant submitted that there were no exceptional circumstances to permit the point to be raised for he first time on appeal. The employment tribunal, however, had acted outside its jurisdiction and that was ne of the exceptional cases where the appeal tribunal would intervene to correct a plain, though nwitting, illegality on the part of the tribunal. The general rule that the appeal tribunal would not ormally allow a decision to be challenged on grounds not argued below was well established, but so was he exception where the fact of the tribunal having strayed outside its jurisdiction appeared beyond doubt ithout any question of a further factual inquiry being needed. The employment tribunal's award of ontractual damages would be set aside.

J F Knight (Roadworks) Ltd v Platfoot; 15 January 2001; EAT/550/99
EAT: Mr Commissioner Howell QC, Mr P Dawson and Mr P A L Parker

COMPENSATION

An employment tribunal upheld an employee's claim of unfair dismissal but in calculating his compensatory award restricted his compensation for loss of earnings to a period of 12 weeks from his dismissal on the ground that they were not satisfied that he had taken sufficient steps to find alternative employment at a time when he was in receipt of job seeker's allowance.

JUDGE PETER CLARK, allowing an appeal by the employee, said that the employee argued, first, that since he was in receipt of job seeker's allowance throughout the period between dismissal and the employment tribunal hearing and since it was the requirement of receiving that benefit that the claimant had taken all reasonable steps to obtain employment, he could not be said to have failed to mitigate his loss under section 123(4) of the Employment Rights Act 1996. That proposition could not be accepted as a matter of law. The question whether a claimant had satisfied the requirements of entitlement to job seeker's allowance according to the relevant government department was a relevant factor, but could not answer conclusively the judicial question as to whether or not he had mitigated his loss for the purposes of section 123(4). However, the employee took a second point, namely that in their reasons for their substantive decision the employment tribunal observed, correctly, that the burden of proving loss lay on the employee, but went on to assume that he also bore the burden of showing that he had taken reasonable steps to mitigate the loss. He did not. Although in *Scottish & Newcastle Breweries plc v Halliday* [1986] ICR 577 a division of the Employment Appeal Tribunal held that the onus lay on the applicant to establish that he had taken reasonable steps to mitigate his loss, that approach had been disapproved by later divisions in *Morganite Electrical Carbon Ltd v Donne* [1988] ICR 18 and *Fyfe v Scientific Furnishings Ltd* [1989] ICR 648. The appeal tribunal was satisfied that the later divisions were correct on that point, following as they did the earlier Court of Appeal decision in *Bessenden Properties Ltd v Corness (Note)* [1977] ICR 821. It seemed clear that the employment tribunal had incorrectly placed the burden of proof on the employee to show that he had taken reasonable steps to mitigate his loss. Accordingly, the finding as to mitigation could not stand and the appropriate course was to remit the matter to the same tribunal to reconsider that question. It would be open to both parties to adduce further evidence, including documents which the employee had subsequently been refused permission to put before the employment tribunal.

Henderson v Northern Leisure plc; 17 January 2001; EAT/70/00
EAT: Judge Peter Clark, Lord Davies of Coity and Mr J C Shrigley

DISABILITY DISCRIMINATION

An employment tribunal upheld a complaint by an applicant of disability discrimination in relation to his dismissal on the ground that his employers had not shown that they had made reasonable adjustments to compensate for his disability in accordance with section 6(1) of the Disability Discrimination Act 1995, in that no real effort had been made to find alternative work for him after he became unable to continue to work as a process operator at an oil refinery.

JUDGE COLLINS, dismissing an appeal by the employers, said that underlying the whole of the tribunal's reasoning was a view that the employers did not really wish to keep the applicant in their employment. The essence of the employers' appeal was that the tribunal had not identified in their reasons any specific step under section 6 which the employers were under a duty to take in order to prevent the arrangements made by them from placing the applicant at a substantial disadvantage. It was correct that the tribunal had not identified any particular step. There was no material on which the tribunal were able to conclude that there was suitable employment available or that some suitable alternative employment would have become available in the reasonably foreseeable future. Without laying down any general rule as to what the burden of proof was in relation to potential adjustments under section 6, where, as in the present case, the potential for alternative employment lay for practical purposes exclusively within the knowledge of the employer, there was a burden of proof on the employer to satisfy the tribunal that there was no alternative employment either available or available in the reasonably acceptable future for the employee. Accordingly, the employment tribunal were entitled to reach the conclusion they did on the ground that the employers had not discharged the burden of proof on them.

Conoco Ltd v Booth; 30 January 2001; EAT/83/00
EAT: Judge Collins, Lord Davies of Coity and Mr P A L Parker

DISABILITY DISCRIMINATION

On complaints by an employee of unfair dismissal and disability discrimination, an employment tribunal held that he had been unfairly dismissed and awarded compensation subject to a contribution in respect of his own fault of 50%. The tribunal also upheld his disability discrimination complaint in respect

of the failure by the employers to make adequate adjustments and made a substantial order for compensation, but without any deduction in respect of contribution, saying that, had the employers given the employee the kind of assistance they were under a duty to provide, there was a strong probability that the lapses on his part that had led to his dismissal in August 1997 would have been avoided.

LORD JOHNSTON, allowing an appeal by the employers, said that the tribunal had proceeded on a wholly false basis with regard to the applicability of the Disability Discrimination Act 1995 to events between June and December 1996, being unaware that the relevant sections did not come into effect until December 1996. Given that situation, their decision could not stand in relation to disability discrimination; nor in relation to unfair dismissal, by reason of the fact that the finding on fairness was substantially based on the existence of discrimination prior to December 1996. Further, the tribunal's approach to contribution in relation to the discrimination aspects was flawed, given a finding of 50% contribution by the employee in relation to the unfair dismissal. The appeal tribunal would not suggest that, in some cases, a finding of contributory fault in relation to a successful claim for unfair dismissal would necessarily bear on a quite separate claim for discrimination, whether on race or disability grounds, at the instance of the same employee in respect of the same employment. However, where the two were inextricably bound up, as in the present case, inasmuch that it was the employee's conduct that led to the dismissal but it was said that the employers' failure to look after his interests in relation to the Act rendered the dismissal unfair, logic dictated that if there was to be a 50% contribution in relation to unfair dismissal the same must apply in respect of the discrimination, having regard to the fact that under section 8(3) of the 1995 Act compensation was to be assessed as a claim for reparation at common law where contributory negligence or fault, if applicable, was a highly relevant element. As the decision was fundamentally flawed by reason of the false premise on which it had proceeded, the matter would be remitted for a fresh hearing before a different tribunal.

Fife Council v McPhee; 27 February 2001; EAT/750/00
EAT(Sc): Lord Johnston, Dr A H Bridge and Miss A Martin

REMEDY

An employment tribunal upheld a claim by an employee that he had been discriminated against by way of victimisation within the meaning of section 2 of the Race Relations Act 1976 when he was not appointed to one of the vacant posts of tenancy services officer in January 1998 and awarded compensation of £10, 221 based on the difference in salary for the period January 1998 to May 1999, when the employee turned down the employers' offer of a tenancy services officer post.

LINDSAY J, allowing in part an appeal by the employee against the remedies decision, said that under regulations 2 and 7 of the Employment Tribunals (Awards in Discrimination Cases) Regulations 1996 there was a duty on the employment tribunal to consider whether to include interest on compensation awarded, even if neither party addressed the tribunal in relation to interest. In the present case, the tribunal's reasons showed no consideration being given to the subject of interest. That was an error of law. The second ground of appeal related to the tribunal's decision that "The employee did not seek a recommendation under section 56(1)(c) of the 1976 Act. None therefore is made." The question was whether it was an error of law for a tribunal which could be seen to have had that provision in mind not to make a recommendation because none was sought. The answer could only be that it depended on the circumstances of the case. The action to be recommended must appear to the employment tribunal to be practicable for the purpose of obviating or reducing the adverse effect on the complainant of the act of discrimination. The adverse effect the amelioration of which was to be the practicable purpose of the recommendation was not some nebulous or general adversity but the adverse effect on the complainant of the very act of discrimination complained of and held to be well-founded. The recommended action must be such that the tribunal could be expected to be able to specify a period within which it was to be taken and it must be capable of being specified with reasonable clarity. Careful consideration needed to be given to whether an apparently obvious step to be recommended would not itself be potentially discriminatory against others. Moreover, detailed information as to the circumstances of the job and practices of the workplace would often be required. Still less, in such cases, would it be reasonable that the tribunal should be expected to specify a recommendation without receiving argument and assistance from the parties. Thus, it could not be said that it was invariably an error of law for a tribunal which had the provision in mind not to make a recommendation because none was sought, and the tribunal had not so erred in the circumstances of the present case.

Fasuyi v Greenwich London Borough Council; 20 October 2000; EAT/1078/99
EAT: Lindsay J, Mr P Dawson and Mr B M Warman

UNFAIR DISMISSAL

An employment tribunal dismissed an employee's complaint of unfair constructive dismissal, holding that the employer had acted reasonably in demoting the employee for poor time-keeping, that there was no

fundamental breach of his contract of employment and that the dismissal was within the band of reasonable responses of a reasonable employer.

LORD JOHNSTON, dismissing an appeal by the employee, said that the tribunal's reasoning confused issues of constructive dismissal which depended on an assessment of whether or not the employer was in material breach of the contract of employment with issues of fairness which arose when an employer effected a dismissal on one of the reasons acceptable under section 98 of the Employment Rights Act 1996. By definition, if constructive dismissal was achieved by reason of the employer having acted in such a way as to indicate for one reason or another that he was repudiating the contract of employment, whether by breach of an express term or by general conduct so outrageous that the employee was not bound to put up with it, the issue of fairness did not arise, because once a fundamental or material breach of contract had been established it could not be defended on grounds of fairness. It was inappropriate to introduce an issue of reasonableness into the issue of constructive dismissal beyond an assessment of the employer's conduct within the context of the contract of employment. There could not be an assessment of a band of reasonable response in relation to the employer's conduct in constructive dismissal because the employer had not effected such a dismissal. For that test to apply, there must have been a dismissal actually effected by the employer. However, on the facts, the appeal tribunal were quite unable to hold that the employer was in material, let alone fundamental, breach of contract when he demoted the employee for poor time-keeping. The way the employee had been performing his contract appeared to be in breach of the contract and that precluded him from relying on the contract in seeking constructive dismissal, since the trigger of the whole matter was his own conduct.

Johnstone v W Wilson & Sons; 27 February 2001; EAT/953/00
EAT(Sc): Lord Johnston, Dr A H Bridge and Miss A Martin

BIAS

When the hearing of an applicant's complaints of unfair dismissal, race and sex discrimination resumed six months after having being adjourned part heard, the applicant was too unwell to attend and her representative, who was black, sought a postponement which was twice refused. He made a third request adding that if he had been an Oxford educated white barrister he would not be so treated. The employment tribunal terminated the proceedings on the ground that they could not fairly determine the applicant's complaints in the light of that accusation of racism. A fresh tribunal ordered the complaints to be struck out under rule 13(2)(e) of the Employment Tribunals Rules of Procedure 1993 on the ground that the conduct of the applicant's representative had been scandalous.

JUDGE PETER CLARK, allowing an appeal by the applicant and a cross-appeal by the respondent against the first decision and dismissing the applicant's appeal against the second decision, said that the first question was whether the first tribunal had been entitled to discontinue the proceedings without notice to the parties. It was common ground that a tribunal had power to order the discontinuance of proceedings and direct a case to be heard by a different tribunal by a combination of its powers under rules 13(1) and 16 of the 1993 Rules, but it was a power to be used sparingly and only for good reason, and the first tribunal had been wrong to order discontinuance. First, it was already an old case. Secondly, the tribunal were 12 days into a hearing anticipated to take 18 days. Thirdly, the context was important. The tribunal had retired to consider the representative's third application for an adjournment on the ground of the applicant's inability to attend due to illness. When they returned, without canvassing the views of either representative, and in the absence of the applicant, they simply declared that they felt unable to continue. It was the duty of any judicial body to approach its task with impartiality and equanimity, not to abdicate its responsibility. Where its authority was challenged, it had to deal with that challenge itself. The proper course would have been to require the applicant's representative to affirm or withdraw his accusations. If he had continued to press his claim of racial bias, it would then be for the tribunal, either of its own motion, or on the basis of an application by the respondent after discontinuance had been ordered, to consider a strike out under rule 13(2)(e). Alternatively, if he withdrew his remarks it would have been open to continue the hearing with or without an adjournment. Given the nature of the representative's remarks, set against the background, the proper course for the tribunal would have been to adjourn the case, giving the applicant notice of the possibility of a strike out and an opportunity to be heard on that. The next question was whether the appeal tribunal should strike out the complaints. The representative, in making an unwarranted charge of racial bias, was attempting to interfere with the due administration of justice and effectively succeeded. His conduct was scandalous, as the second tribunal found, and, coming on top of his repeated applications for an adjournment, was also vexatious. Ought the applicant to be fixed with her representative's conduct in her absence? She plainly gave him express instructions to persist in his applications for an adjournment. So far as his remarks were concerned, it was sufficient that a party had instructed the representative to conduct the case on her behalf, but also the applicant had in an affidavit wholeheartedly endorsed his remarks. The complaints would be struck out, and, the applicant having acted unreasonably in conducting the proceedings within the meaning of rule 12(1) and given her means to the second tribunal, the costs order of one day's costs made by that tribunal in favour of the respondent would be upheld.

Bennett v Southwark London Borough Council; 26 January 2001; EAT/1273/97
EAT: Judge Peter Clark, Mr K Edmondson and Mr D J Hodgkins

EMPLOYMENT TRIBUNAL

A respondent employer attended a hearing at an employment tribunal without witnesses or legal representation believing it would be a hearing for directions. A tribunal chairman, sitting alone, refused to adjourn the proceedings and proceeded to hear and determine the employee's claim for payment of salary and bonus following the termination of his employment, which involved determination of disputed issues of fact as to whether the employee had been in breach of his contract.

MR COMMISSIONER HOWELL QC, allowing an appeal by the employer, said that it was apparent that the case required the resolution of substantial disputes as to issues of fact and an assessment of the credibility of individual witnesses. If a chairman did not exercise his discretion, on reasonable grounds, under section 4(5) of the Employment Tribunals Act 1996 in favour of sitting alone, a case had to be heard by an employment tribunal fully and properly constituted under section 4(1). On the material before the appeal tribunal, the required consideration under section 4(5) never took place in the present case. The consequence was that there had been a clear error of law, and it was not necessary to consider whether the proceedings before the chairman were a nullity or only an irregularity. Further, the only reasonable conclusion to which a chairman could have come, in addressing the issue under section 4(5), was that the

case was one which required to be dealt with by a full employment tribunal. Accordingly, the employment tribunal decision would be set aside and the case remitted to a full tribunal.

Professional Selection & Development Ltd v Wahab; 26 October 2000; EAT/64/00
EAT: Mr Commissioner Howell QC, Mr I Ezekiel and Lord Gladwin of Clee

REDUNDANCY

An employer undertook a redundancy selection process using an established standard assessment procedure based on factors relating to performance, length of service, etc, each marked on a points system and then given different weightings. An employee was told that he had been provisionally selected for redundancy and a brief discussion took place. There was no further discussion until four days later when he was told that there were no suitable alternative positions and that he could appeal under the grievance procedure. An employment tribunal, by a majority, upheld his complaint of unfair dismissal on the grounds that the selection procedure was flawed and that the opportunity for consultation had been inadequate.

MR COMMISSIONER HOWELL QC, allowing an appeal by the employer, said that the issues of fairness and reasonableness in relation to the employee's dismissal needed to be judged by the test of the "range of reasonable conduct" for a reasonable employer in the circumstances facing the employer at the time. Only if the selection system itself, or the way it was applied in the employee's individual case, fell outside that range could his dismissal for redundancy properly be characterised as unfair. The detailed reasoning of the majority of the employment tribunal indicated that they were addressing some question other than the range of what might have been done by a reasonable employer. Even if not overtly intending to substitute their own view as to how they would themselves have acted, they had fallen into the error against which tribunals were enjoined by *British Aerospace plc v Green* [1995] ICR 1006, 1009–1010, of allowing themselves to get involved in an over-detailed exercise of picking away at individual aspects of the standard selection system used by the employer and of its application in the particular case: even down to making criticisms of individual markings awarded. Moreover, the criticisms were not even well-founded and could not reasonably support a conclusion that the system and its application fell outside the range of fairness and reason. Specifically, there was nothing in the broadly defined performance categories or the weightings that could be said to make them by nature inappropriate for office employees. It was inherent in the nature of the exercise that the criteria must be capable of being applied uniformly across a broad range of employees, and that inevitably meant that they would be expressed in general and not individually tailored terms. The majority had misdirected themselves as to the test of fairness, and it necessarily followed that their decision could also not stand on the alternative ground of their secondary conclusion of procedural unfairness because of inadequate consultation. The case would be remitted for redetermination of all issues. But the previous tribunal's unanimous findings of fact might properly be taken as the practical starting point. Also, it was the view of the appeal tribunal that, while the adequacy of consultation was a matter of fact and degree for the tribunal to determine, it fell short of an adequate and reasonable standard of consultation for an employee to be told on Monday that he was to be selected for redundancy dismissal to take place on Friday and effectively left with the burden of instituting "grievance" procedures if he wished further consideration to be given to him. Reasonable consultation must involve a joint approach to what should be viewed as a mutual problem. If consultation was not to be futile it had to acknowledge at least the possibility of realistic alternatives and allow them to be properly explored.

Chronos Richardson Ltd v Watson; 27 March 2001; EAT/1340/99
EAT: Mr Commissioner Howell QC, Mr B V Fitzgerald and Mr H Singh

TRANSFER OF UNDERTAKING

Seven of the employees of a specialist scaffolding company worked exclusively at a power station where the company had a contract to provide scaffolding services. When the contract expired a contract for scaffolding, together with other services, was granted to another company, who did not take on any of the employees, using scaffolders from their own pool of labour. Meanwhile, the employer's contract was extended for 12 weeks to clear its scaffolding from the site. The employees brought complaints of unfair dismissal and entitlement to redundancy payments against both companies in the alternative, and their union brought a complaint against the first company alleging a lack of consultation contrary to regulation 10 of the Transfer of Undertakings (Protection of Employment) Regulations 1981. The employment tribunal concluded, as a preliminary issue, that there had been no transfer of an undertaking for the purposes of the 1981 Regulations.

JUDGE PETER CLARK, dismissing appeals by the employees and the union, said that it was submitted that the employment tribunal had been wrong to find that the two contracts were fundamentally different. That was a permissible finding with which the appeal tribunal could not interfere. Nevertheless, it was argued, it was in any event an irrelevant factor: merely because the service provided by the employer had been subsumed into a wider contract entered into by the second company was nothing to the point. The appeal tribunal disagreed: it was a relevant, though not conclusive, factor in determining whether the

ormer economic entity operated by the employer was transferred to the second company if the service ormerly provided differed materially from that provided by the incoming contractor. It was then ubmitted that the employment tribunal had elevated the factor into one determinative of the transfer uestion, and *Farmer v Danzas* (unreported) 6 October 1994 was relied on. But the facts of that case were ar removed from those of the present case and no assistance was gained from the, plainly correct, bservation by Morison J: "There is nothing in any European decision to suggest that an economic entity eases to retain its identity merely because the economic activity is subsumed into the transferee's usiness." The employment tribunal in the present case did not appear to have isolated the factor as being determinative of the transfer question, as opposed to the employment tribunal in *Farmer* deciding that case n a single factor, all other factors pointing to a transfer, itself an impermissible consideration, so as to rrive at the opposite conclusion. Equally the appeal tribunal was satisfied that the continuation of the mployer's contract had not been treated by the employment tribunal as being itself determinative. As to ts relevance, it was submitted that there would often be cases in which the takeover by one contractor vould take place over a period of time, and that there was a difference between the employer's original ontract and the further contract, described by the tribunal as an extension, to remove the scaffolding. hat, however, confused the contract with the economic entity, which consisted of scaffolding work nvolving a dedicated workforce using the employer's scaffolding equipment at the power station. The fact vas that that part of the employer's undertaking continued while the second company was also on the site roviding scaffolding services using its own men and equipment. In those circumstances it could not be aid that the continuation of work by the employer was irrelevant to the overall question of whether the economic entity operated by the employer was transferred to the other company, retaining its own identity.

AEEU v Lyndon Scaffolding plc; 26 January 2001; EAT/1242/99
EAT: Judge Peter Clark, Mr W Morris and Mr J C Shrigley

WAGES

Employers reduced a sum of 70p per hour previously paid to an employee as an attendance bonus to 30p, removing some of the conditions attaching to it, and increased his basic hourly pay rate from £3.27 to £3.67 so that it complied with the national minimum wage. An employment tribunal dismissed a complaint by the employee that the employers were in breach of section 1(1) of the National Minimum Wage Act 1998 and regulation 11 of the National Minimum Wage Regulations 1999 or that they had made unlawful deductions from his wages contrary to section 13(1) of the Employment Rights Act 1996.

LORD JOHNSTON, allowing an appeal by the employee, said that regulation 31(1)(d) of the 1999 Regulations provided that allowances other than those attributable to the performance of the worker had to be left out of account in calculating remuneration in terms of section 1 of the 1998 Act. However, for the purposes of section 13 of the 1996 Act all such allowances could be taken into account in calculating wages. What then had to be considered in the present case was whether it was appropriate to look at the overall package in terms of ultimate take home pay or at the effect the new package had had on allowances. The appeal tribunal preferred the latter approach, since there was no doubt that under the new arrangement the attendance allowance, even when the conditions were varied, had in fact been reduced. That arrangement, whereby part of the attendance allowance was removed to supplement the rate of pay up to the appropriate level, could not be distinguished from the exercise carried out in *Davies v M J Wyatt (Decorators) Ltd* (unreported) 13 July 2000 [see Recent Points [2001] ICR Part 3], where it was held that to fund holiday pay by removing sums from the basic wage package was unlawful. Following that case, the appeal tribunal would hold that in the present case the effect of the arrangement was to create an unlawful deduction of wages. The matter would be remitted to consider the issue of whether there had been any consent to the variation by the employee.

Laird v A K Stoddart Ltd; 23 January 2001; EAT/834/00
EAT(Sc): Lord Johnston, Miss S B Ayre and Mr P M Hunter

COMPENSATION

An employment tribunal deducted a global amount of 50% from an award of compensation for unfai dismissal in respect of (i) an assessment of the chances of the applicant being kept in employment, had a fai investigation been carried out into the conduct for which he was dismissed, and (ii) the extent to which hi conduct had contributed to his dismissal.

LORD JOHNSTON, allowing an appeal by the employers, said that the employers' argument was that although the tribunal had identified two issues that it required to address, it had then intermingled them and reached a unitary conclusion which did not separate out those two issues which could be classified respectively, as an assessment of whether or not, with a proper investigation, dismissal would still hav followed (the *Polkey* approach) and, separately, the extent to which the applicant's conduct contributed to his dismissal. Reference was made to *Rao v Civil Aviation Authority* [1994] ICR 495, 501G in which Si Thomas Bingham MR identified the two separate issues and declared that the *Polkey* type situation required to be considered and an assessment in percentage terms made before a tribunal went on to consider the question of contribution by way of conduct. The employers' approach was correct inasmuch that the tribunal was required first to consider the extent to which a *Polkey* type deduction should be made and only thereafter to go on to consider what percentage of the remaining figure should be subject to deduction again by reason of contribution. The appeal tribunal was unable to determine what was in the mind of the employment tribunal as a percentage to be deducted in relation to *Polkey*, and that was important because it was the net figure from any such deduction which required to be the base for any contribution. By way of example, if the view of the employment tribunal was that the *Polkey* deduction should be 50% and the applicant's conduct should be assessed at 50%, then the award should have been 50% of 50% and not 50% simpliciter. The matter would be remitted for clarification and assessment of the *Polkey* deduction and, separately, the issue of contribution.

Baillie v McFarlane; 2 May 2001; EAT/1403/00
EAT(Sc): Lord Johnston, Dr A H Bridge and Dr W M Speirs

FRUSTRATION

An employee who was unable to work as a result of suffering injuries to his hand at work remained "on the books" of the company by which he was employed, though he received no pay, apart from £10 of vouchers at Christmas, and was in receipt of various benefits. When the company went into receivership three years later he was sent forms relating to redundancy payments, but his claim for a payment was rejected by the Secretary of State for Trade and Industry. An employment tribunal dismissed his complaint for a redundancy payment on the ground that his contract of employment had been frustrated when he was injured.

JUDGE PUGSLEY, dismissing an appeal by the employee, said that the doctrine of frustration did apply to contracts of employment and had been correctly defined by the employment tribunal as occurring when an event made the contract impossible or unlawful to perform or radically different from what the parties originally intended. When such a contract was frustrated it came to an end without a dismissal by the employer or a resignation by the employee. It was argued on appeal that the employment tribunal had given insufficient weight to the fact that a contract of employment was a voluntary relationship between parties and it was a contradiction in terms that, although both parties regarded the employment as continuing, it had in fact terminated. It was said that the doctrine of frustration did not permit a court to impose on the parties a termination of the contract against their will. Counsel sought to distinguish *Sharp v McMillan* [1998] IRLR 632 on the ground that in that case both parties recognised there was no prospect of the employee returning to work and it was agreed he be kept on the books to qualify for a more generous pension. It was submitted in the present case that a distinguishing factor was that the parties acknowledged the contract had come to an end and entered into a different arrangement. But in *Sharp* Lord Johnston said, at para 20: "if a contract is frustrated by operation of law, there is nothing to revive and a nullity has to be declared. There is nothing to prevent parties entering into a new arrangement but they must do so with the clear intention to achieve that result . . . If the parties both think . . . the previous contract is still subsisting, there is no intention to create a new contract . . ." In the present case the employment tribunal had found as a fact that, contrary to what the employee contended, he had no real intention of going back to work and there was no prospect of his doing so. Given that finding, it could not be said that the tribunal had erred in concluding that frustration of the contract had taken place. The contract no longer subsisted and, therefore, the employee was not eligible for redundancy pay.

Collins v Secretary of State for Trade and Industry; 31 January 2001; EAT/1460/99
EAT: Judge Pugsley, Mrs J M Matthias and Mr D Norman

ROTECTED ACT

An employment tribunal held that it had no jurisdiction to hear an applicant's complaint, pursuant to ection 103A of the Employment Rights Act 1996 (as inserted by the Public Interest Disclosure Act 1998), hat he had been unfairly dismissed in September 2000 because of a protected disclosure he had made in November 1993, on the ground that the disclosure relied on had taken place before section 103A came into ffect in July 1999.

LORD JOHNSTON, allowing an appeal by the applicant, said that the preliminary issue to be etermined was whether the protection now afforded by section 103A of the 1996 Act could apply in elation to a disclosure which took place prior to the coming into force of that section. It was not disputed hat what the applicant was said to have done in 1993 by reporting his employers to the Inland Revenue mounted to a protected disclosure. It appeared that the question at issue was novel, not only in relation to rotected disclosure, but generally in relation to protected conduct, and, indeed, in relation to unfair ismissal generally. In the opinion of the appeal tribunal, the section was not properly to be regarded as aving any retrospective effect in relation to the present case, because the crucial aspect was the fact that he dismissal was effected after it came into force. It was that act of the employers that required the pplicant to claim a protected disclosure. It was a voluntary act on the part of the employers and it was ot, therefore, appropriate to regard the legislation as having taken away any rights available to them. The isclosure having been made in 1993 acquired the status of a protected disclosure when it became relevant o an issue of dismissal subsequent to 1998. There was nothing inconsistent or unfair in that approach and, ndeed, it would be very surprising if, in relation to unfair dismissal cases generally, going back to when the egislation was first implemented, it would be incompetent for either an employer or an employee to refer o conduct predating the coming into effect of the legislation. If the issue was to be balanced as one of airness, it would be manifestly unfair that the applicant should be denied the right to claim a protected isclosure if it was relevant to a dismissal effected after 1999 notwithstanding that the actual act of isclosure might have been many years before.

Miklaszewicz v Stolt Offshore Ltd; 2 May 2001; EAT/1385/00
EAT(Sc): Lord Johnston, Miss S B Ayre and Mr P M Hunter

IME LIMIT

An employment tribunal dismissed an employee's complaint of unfair dismissal, made some two years fter the effective date of termination of his employment, on the ground that it was not satisfied that it had ot been reasonably practicable for the complaint to have been presented in time under section 111 of the mployment Rights Act 1996.

BELL J, dismissing an appeal by the employee, said that the essence of the employee's case was that he ad been unable to make his application earlier than he had because of continued mental ill-health ollowing a breakdown due to his work conditions. It was argued, first, that the employment tribunal had rred in making a distinction between presenting, or setting in motion, a claim on the one hand and rosecuting, and thus proceeding with, it on the other, so far as the first stage of the test for ection 111(2)(b) was concerned. Moreover, it was argued, it would be unjust if an application by omeone who was mentally ill was "presented" for the purposes of section 111(2) by the mere act of getting t to the office of the employment tribunal, because he might be met by an application challenging his ntitlement to bring proceedings or an application to strike out for want of prosecution. But the rosecution of a claim was a very different exercise to its presentation as described in rule 1(1) of the mployment Tribunals Rules of Procedure 1993, and it made obvious sense both that an application hould be promptly presented in that sense and that presentation in that sense was all that was required to neet the requirements of section 111(2). It was sufficient if the Form IT1 stated the nature of the claim uite simply. It made no sense to suggest that "presented" was meant in its simple sense, as it clearly was, or the purpose of meeting the time limit in section 111(2)(a) but meant "presented and prosecuted" for the urposes of what was reasonably practicable, or indeed, reasonable, when applying paragraph (b).

Turner v Havering London Borough Council; 4 December 2000; EAT/1066/99
EAT: Bell J, Lord Davies of Coity and Mrs D M Palmer

COMPENSATION

When awarding compensation for unfair dismissal an employment tribunal, inter alia, reduced th compensatory award by 50% on the ground that it was just and equitable to do so to reflect the extent t which the applicant's actions contributed towards his dismissal "bearing in mind a range of facto including the employer's [conduct]".

LINDSAY J, allowing an appeal by the employer, said that it was argued by the employer that th tribunal had misapplied section 123(6) of the Employment Rights Act 1996 in that it had had regard t the employer's conduct as well as the applicant's conduct rather than limiting its inquiry to the applicant conduct. The cases showed that in considering section 123(6) the tribunal was limited to looking at th extent to which the dismissal had been caused or contributed to by any action of the applicant. It wa inescapable that the tribunal had erred in law in looking outside that to which section 123(6) limited i The extraneous matter taken into account could only have served to reduce the amount of the reductio as if to reflect some wrong on the employer's part. That error alone justified setting aside th compensatory award.

London Underground Ltd v Shah; 27 February 2001; EAT/0140/00
EAT: Lindsay J, Lord Davies of Coity and Mrs R A Vickers

CONSTRUCTIVE DISMISSAL

An employee resigned following his employer's decision that he could no longer deal with cas transactions because he was suspected of dishonesty. An employment tribunal rejected his complaint c unfair dismissal, holding that he had not been constructively dismissed because the employer had nc fundamentally changed his job and so had not repudiated his contract of employment.

MR RECORDER LANGSTAFF QC, allowing an appeal by the employee, said that the employee's jo description had never formally been reduced to writing. In such circumstances the only material availabl to identify what he was obliged to do for his employer was the way in which the contract had beer performed. With the guidance of Lord Hoffmann in *Carmichael v National Power plc* [1999] ICR 1226 1234, it was open to the employment tribunal to find that the employee's employment was as a builders merchants yard operative. The tribunal found that his "principal job" was "serving customers". Th "new" duties proposed by the employer did not relate at all to dealing with customers. Requiring a employee to cease doing what had been his principal job and to take up a new role, in circumstances in which there had been no allegation of dishonesty, would amount to a variation of the employee's contract Such a variation could not be imposed without the employee's consent. To do so would almost always b capable of being a repudiatory breach. Whether it reached the materiality sufficient for the breach to b repudiatory had to be judged objectively by reference to its impact on the employee. Once the breach wa of sufficient materiality to be regarded as repudiatory, the underlying motive became irrelevant. Th presence of an allegation of dishonesty thus made no difference. On the facts recorded by the tribunal, i would be difficult to come to the conclusion that there had been no fundamental change in the employee' job. It was not possible to tell how the employment tribunal had reached such a conclusion. The appea would be allowed and the matter remitted for rehearing, when the issue was likely to be whether the constructive dismissal was unfair.

Hilton v Shiner Ltd; 24 May 2001; EAT/9/00
EAT: Mr Recorder Langstaff QC, Ms B Switzer and Miss S M Wilson

DISABILITY DISCRIMINATION

An employee who suffered from depression was dismissed because she had been absent from work for over a year on medical grounds. An employment tribunal dismissed her complaint of disability discrimination, finding that there was no evidence that the employers would have treated differently anyone else who had been absent for a year, and, after hearing evidence from the employee and her doctor, that no reasonable adjustments could have been made.

LINDSAY J, allowing an appeal by the applicant, said that one possible error of law by the employment tribunal was that, in deciding whether the employee was disabled, they had not looked at the correct point of time at which disability needed to be adjudged. The appropriate time was the date of the unfavourable treatment alleged. But there was no cross-appeal on that point. More significantly, it was plain that despite their reference to *Clark v Novacold Ltd* [1999] ICR 951, the tribunal had taken the required comparison, under section 5(1)(a) of the Disability Discrimination Act 1995, to be between the treatment of the disabled person and the treatment of anyone else who had been absent for a year. That was not the correct comparison. The correct approach was to ask, first: what was the reason for the employee being

smissed? The reason was her long absence from work and that she was unable to predict when, if ever, e medical prognosis would be such as to enable her to return. The second question was: was that reason ie which related to her disability? Answer: "Yes". The third question was: would the employers have smissed some other person to whom that reason would not apply? Answer: "No"; there would have been reason to do so—it was not, for example, as if there had been shown to be a redundancy situation. The nployment tribunal had erred in looking only to whether some other person absent from work for a year ould equally have been dismissed. It was not clear whether the employment tribunal were of the view at the employers were under any section 6 duty to make adjustments, stating that neither the employee or her general practitioner could think of anything that would have represented a satisfactory adjustment. ut the duty to make adjustments under section 6 was on the employers, and the employers had not nsidered any adjustments, as it had been their view that the employee was not suffering from any sability. There would, no doubt, be cases where the applicant's evidence alone would establish a total navailability of reasonable and effective adjustments, but it did not follow that, because the applicant, ng absent from work and clinically depressed, and her general practitioner, who was unlikely to know hat office or other practicabilities were open to the employers, could postulate no useful adjustment, the ction 6 duty on the employers should, without more, be taken to have been satisfied.

Cosgrove v Caesar & Howie; 6 June 2001; EAT/1432/00
EAT (Sc): Lindsay J, Dr A H Bridge and Mr R P Thomson

ACE DISCRIMINATION

An employment tribunal upheld an applicant's claim of racial discrimination contrary to section 4(2)(c) the Race Relations Act 1976 against both the first respondent, who had dismissed him, and the second spondent, which had acquired the business of the first respondent, holding that the former had been ting as agent for the latter for the purposes of section 32(2) of the Act.

MR COMMISSIONER HOWELL QC, allowing an appeal by the second respondent, said that no ound had been demonstrated for challenging the relevant factual conclusions of the employment ibunal: in particular that the applicant's dismissal by the first respondent was an act of unlawful scrimination carried out by the management of that company but with the encouragement and at the stigation of the second respondent. The question was whether those facts gave rise to any liability on the rt of the second respondent itself under the 1976 Act. Acts which were made unlawful only by section 31 the Act (inducing, or attempting to induce, another person to do any act which contravened Part II or III) ere outside the jurisdiction of employment tribunals. Conduct consisting only of encouragement or stigation might not therefore give rise to a claim in an employment tribunal against the person sponsible, even though done to induce an unlawful act against a person in employment. An unlawful act r which a claim might be brought against the inducer had to be identified: either one unlawful by virtue of rt II of the Act itself, so that the tribunal had jurisdiction under section 54(1)(a), or one made unlawful der section 32 or 33, by treating the inducer as having committed an act of discrimination contrary to rt II against the complainant, so that the tribunal had jurisdiction under section 54(1)(b). The acts of scrimination made unlawful under Part II were, so far as relevant, defined in section 4, in each case nited to acts by a person "in relation to employment by him". The structure of section 32 was simply to tribute the authorised acts of an agent to his principal for the purpose of other provisions of the Act. It d not provide any separate way in which those acts were made or treated as unlawful, under Part II or ction 32 itself. The act found by the tribunal to have been done by the first respondent at the second spondent's instigation was the dismissal of the applicant. However, that dismissal was from the nployment of the first respondent; the applicant had never been an employee of the second respondent d there could be no finding that he had ever been employed by the first respondent as agent of the second spondent or in any other way than on its own behalf acting as principal. It followed that the applicant's smissal could not amount to an act of unlawful discrimination contrary to section 4(2)(c) on the part of e second respondent, since he was at no time employed by it.

School of Finance & Management (London) Ltd v Perera; 3 May 2001; EAT/542/00
EAT: Mr Commissioner Howell QC, Mr B Fitzgerald and Lord Gladwin of Clee

EX DISCRIMINATION

An employment tribunal dismissed a complaint by a lecturer and course leader that by failing to consult r concerning matters relating to the course while she was on maternity leave the respondent college had scriminated against her on the ground of her sex.

JUDGE PETER CLARK, dismissing an appeal by the applicant, said that it was accepted that to subject woman to a detriment because of her pregnancy was unlawful sex discrimination. It followed that, if the eatment complained of by the applicant amounted to a detriment and was causally connected to her egnancy, her claim succeeded. In *Jerimiah v Ministry of Defence* [1980] ICR 13, 26, Brandon LJ said at "detriment" meant "putting under a disadvantage". The factual question as to whether the applicant as put at a disadvantage might be answered by reference to whether a reasonable employee might or

might not take the view that there was a detriment. To constitute a detriment there had to be somethir serious or important about it. The critical question was whether, on the facts found by the employmer tribunal, the tribunal were entitled to conclude, expressly or implicitly, that the applicant had not suffere a detriment by not being consulted during her maternity absence. The need for consultation and its timir were material factors for the tribunal to consider. The bald assertion by the applicant that no consultatic during maternity leave equalled unlawful discrimination without more could not be accepted. Th tribunal's findings on the absence of consultation and its effect on a reasonable employee, as opposed to th applicant's subjective view, were permissible; and, absent detriment, the statutory tort was not made out.

Ojinnaka v Sheffield College; 7 March 2001; EAT/0201/00
EAT: Judge Peter Clark, Mr D Chadwick and Mr B Gibbs

STRIKING OUT

An employment tribunal chairman struck out an applicant's claim of race discrimination, in relation t the respondent's decision to strike him off its register of nurses, on the basis that it was frivolous, that it ha no chance of success and was an abuse of process.

JUDGE ALTMAN, dismissing an appeal by the applicant, said that the chairman had concluded: "I the absence of any true comparators the applicant raises no prima facie case of race discrimination. H claim is frivolous in that it has no substance." It was true that in some cases the identification c comparators did require an input from the respondent, but in the present case there was, on the tribunal finding, no scope for an argument that there was an appropriate comparator. Rule 13(2) of th Employment Tribunals Rules of Procedure 1993 provided the power to strike out any originatin application on the grounds that it was "scandalous, frivolous or vexatious". The applicant complaine that the proceedings had been struck out without hearing evidence, but the rules envisaged that if a matte was plain without the need for evidence the claim should be struck out. It was submitted that the word "scandalous, frivolous or vexatious" were not designed to cover cases where there was no reasonabl prospect of success and that if Parliament had intended the power to strike out to be so used it would hav said so in rule 13 or have referred to it in rule 7. The appeal tribunal disagreed. It was said that Parliamen by dealing with the prospects of success in rule 7(4), had indicated a narrower meaning for "scandalou frivolous or vexatious" than in other jurisdictions. The appeal tribunal did not see why that should be sc "Frivolous" often meant lacking in substance, and the words "frivolous or vexatious" had been used in th courts for over 100 years and the *Supreme Court Practice* defined them as applying to cases which wer "obviously frivolous or vexatious or obviously unsustainable". The finding that there was an abuse wa strictly speaking, wrong. There was no power to strike out on the grounds of abuse of process. But th finding that the claim was frivolous in that it had no chance of success was one which the tribunal chairma had been entitled to make and there was no error of law in that respect.

Balamoody v UKCC for Nursing Midwifery & Home Visitors; 5 December 2000; EAT/744/99
EAT: Judge Altman, Mrs R A Vickers and Mr G H Wright

COSTS

An employment tribunal dismissed an applicant's complaint of race discrimination and ordered him to pay the respondent employer's costs on the ground that, in bringing and conducting his case, he had behaved frivolously, vexatiously and unreasonably, though not abusively, within the meaning of rule 12(1) of the Employment Tribunals Rules of Procedure 1993.

MR RECORDER BURKE QC, dismissing the applicant's appeal against the costs order, said that the ground of appeal was that the employment tribunal had erred in law in their interpretation of the way in which evidence had been given at the hearing so as to conclude that the applicant's conduct in pursuing his claim was capable of being frivolous, vexatious or otherwise unreasonable, when there had been no strike out proceedings on the basis of lack of merits and no costs warning. The appeal tribunal wished to make clear that employment tribunals should always have in mind the very real difficulties which faced a claimant in a discrimination claim. It followed that, in the absence of misconduct, a costs order in a discrimination case was likely to be made only in a very rare and even exceptional case. However, it was for the employment tribunal to decide whether a party had behaved frivolously, vexatiously or otherwise unreasonably and whether to make a costs order, exercising a discretionary jurisdiction. The appeal tribunal did not accept that an employment tribunal could not make a costs order against an applicant simply because there had been no previous application to strike out, no application under rule 7(4) of the 1993 Rules or no warning as to costs. Those were factors which a tribunal might or might not wish to take into account but the appeal tribunal could not see how it could be laid down as a matter of law or guidance that such matters could be preconditions to the exercise of a broad discretion under rule 12. The tribunal's decision was not perverse.

Saka v Fitzroy Robinson Ltd; 14 March 2001; EAT/0241/00
EAT: Mr Recorder Burke QC, Mrs R Chapman and Mr G H Wright

EMPLOYMENT TRIBUNAL

Following the opening by his representative of his complaint of constructive unfair dismissal, an applicant was informed by the employment tribunal that "bearing in mind his resignation letter and that he appeared to be unable to identify any breach of contract, it was the opinion of the tribunal that the applicant's complaint did not have any reasonable prospect of success". The applicant was warned that "if at the conclusion of this case the tribunal considered that he had in bringing these proceedings acted frivolously or unreasonably the tribunal would consider making an award of costs". The applicant then withdrew his complaint and his originating application was dismissed.

JUDGE WAKEFIELD, allowing an appeal by the applicant, said that in normal circumstances where an applicant had withdrawn an originating application and it had been dismissed by an employment tribunal, any appeal against the decision of the tribunal made in consequence of the withdrawal would be bound to fail. The circumstances of the present case, however, were not normal. The way in which the employment tribunal had conducted itself had resulted in a denial of a fair hearing of the applicant's originating application. While a tribunal might, and often should, explore with the parties any perceived weaknesses of the case, either at the outset or during the hearing, and might properly alert a party who might otherwise not know its powers regarding costs, what had occurred in the present case went far beyond the sort of useful dialogue which assisted in resolving or limiting the matters in dispute. The tribunal, in the language it used, even if it was not in fact the case, had demonstrated a concluded view hostile to the applicant. That had caused the applicant to abandon his claim. The appeal tribunal were satisfied that he did that by reason of the pressures he felt to have been exerted by the employment tribunal through their expressed view as to the merits of his case and the possible consequences to him in costs.

Lewis v Kingston-upon-Thames Royal London Borough Council; 3 May 2001; EAT/0221/00
EAT: Judge Wakefield, Mr D J Jenkins and Miss S M Wilson

EVIDENCE

An employment tribunal upheld an applicant's complaint that she had been unfairly dismissed, having found that the question depended to a significant extent on what had happened at a particular meeting and that the tribunal preferred the applicant's evidence. Subsequently, evidence came into the employers' possession which indicated that between her dismissal and the tribunal hearing the applicant had made numerous harassment calls to the mobile phones of executives of the employers. On an application by the employers for review, the employment tribunal revoked its earlier decision and directed a rehearing, on the ground that, had the tribunal been in possession of the new evidence at the original hearing, it would possibly have taken a different view of the applicant's credibility and reached a different decision.

SIR CHRISTOPHER BELLAMY QC, dismissing an appeal by the applicant, said that the applicar argued that the employment tribunal had been wrong to take account of facts that had arisen after th termination of her employment which were irrelevant to the question of the fairness of her dismissal, an she relied on *W Devis & Sons Ltd v Atkins* [1977] ICR 662 and *Soros v Davison* [1994] ICR 590. Thos cases, however, were not authority for the proposition that evidence of post-termination events coul never be admitted by an employment tribunal if such evidence was relevant to establishing what had in fac happened in the period prior to the termination of the contract. The law was correctly stated in *Harvey o Industrial Relations and Employment Law*, para D1[865]: "in very exceptional cases evidence c subsequent events may be admissible to establish the truth of evidence occurring before the dismissal . . . Admission of such evidence was likely to be exceptional and employment tribunals needed to be vigilant t ensure evidence of events post-termination was not used to circumvent, by an indirect route, the principle of *Devis* and *Soros*. There was no doubt that the circumstances set out in rule 11(1)(d) of the Employmen Tribunals Rules of Procedure 1993 were satisfied in the present case. It was, therefore, for the employmen tribunal, in the exercise of the wide discretion conferred by rule 11(7), to decide whether the new evidenc was such as to justify revoking its earlier decision. In the employment tribunal's view the new evidence cas strong doubt on the accuracy of the applicant's evidence, and it was a case that turned directly on th credibility of her evidence. There was no error of law in the exercise of the tribunal's decision.

Overton v Healthcall Services Ltd; 4 July 2001; EAT/282/01
EAT: Sir Christopher Bellamy QC, Mr W Morris and Mrs R Vickers

JURISDICTION

An employee who failed to attend the hearing of his complaints of breach of contract and breach of hi right not to suffer a detriment under section 44 of the Employment Rights Act 1996 had both claim dismissed under rule 9(3) of the Employment Tribunals Rules of Procedure 1993 by an employmen tribunal chairman siting alone.

JUDGE PUGSLEY, allowing an appeal by the employee, said that section 4(2) of the Employmen Tribunals Act 1996 provided that proceedings specified in section 4(3) should be heard by a chairma alone, but the list did not include a claim under section 44 of the Employment Rights Act 1996. It wa submitted by the respondent that rule 9(3) of the 1993 Rules did not require the hearing actually to begi and the employment tribunal to be assembled, but rather only non-attendance at the tribunal. It seeme implicit to the appeal tribunal that, where section 4 required a full tribunal to hear a case, an orde dismissing the claim under rule 9(3) could not be made by a chairman sitting alone by virtue o rule 13(8)(b). If Parliament had laid down that a certain matter could only be heard by a full tribunal, the the proper interpretation of rule 13(8) was that only a full tribunal could exercise the power to dismis under rule 9(3). The question then was whether the chairman's dismissal of the employee's case unde rule 9 was still valid as far as it concerned the breach of contract claim, which she was empowered to hea alone. It seemed wholly misplaced to say that if a tribunal had to be fully constituted to hear the section 4 claim a tribunal consisting of a chairman alone could properly exercise its powers in respect of a claim such as breach of contract which did not need a full tribunal. The reality was that, had the chairma appreciated that she did not have power to deal with the section 44 claim, it would have been perverse o her to exercise the discretion to sit alone on another aspect of the case.

Gill v Whitbreads plc; 28 February 2001; EAT/1444/99
EAT: Judge Pugsley, Mrs D M Palmer and Mr G H Wright

PROCEDURE

An employment tribunal refused an application by a respondent employer to adjourn a remedy hearing pending its appeal to the Employment Appeal Tribunal against the decision of the employment tribuna upholding a complaint by the applicant employee following his dismissal.

JUDGE LEVY QC, dismissing an appeal by the employer, said that the law was still as stated in *Medallion Holidays Ltd v Birch* [1985] ICR 578, 584C where the Employment Appeal Tribunal had rejected the argument that that tribunal had power to review interlocutory decisions of industrial tribunals on their merits and had stated that interlocutory matters such as the granting or refusal of an adjournment were wholly within the discretion of the industrial tribunal. There was no authority, nor support from principle, for the employer's submission that while the decision of an employment tribunal was under appeal the tribunal had no locus to deal with the claim in any way, including fixing a remedy hearing. Remedy hearings in small cases such as the present were held while an appeal against the substantive decision was still extant.

John Menzies Ltd v Durrant; 5 December 2000; EAT/1426/00
EAT: Judge Levy QC, Mr P Dawson and Mr K M Young

TRANSFER OF UNDERTAKING

On an application by a trade union complaining of a failure to consult with employees, in accordance with regulation 10 of the Transfer of Undertakings (Protection of Employment) Regulations 1981, the employment tribunal held that the liability to pay compensation in relation to such failure, pursuant to regulation 11, did not transfer to the transferees, on the ground that the liabilities that transferred under regulation 5 were liabilities other than those provided for by the Regulations themselves.

LORD JOHNSTON, dismissing an appeal by the trade union, said that the case raised a sharp issue which was not determined by *Kerry Foods Ltd v Creber* [2000] ICR 556. The appeal tribunal was concerned that, if an employer, intending to transfer all or part of his business in such a way that the 1981 Regulations would apply, knew that any compensation payable by reason of his failure to consult his employees in advance of the transfer would be transferred to the transferee, there would be no incentive on the part of the employer to conduct such consultation process. Where matters were finely balanced, any construction of the words "liabilities under or in connection with any . . . contract" in regulation 5(2) should ensure that the employer had an incentive to comply with the obligations imposed on him in the transfer process. Such a construction required the conclusion that the transferor would retain responsibility to pay compensation for his own failure to consult with his employees. Accordingly, any obligation to pay compensation in terms of regulation 11 which was a responsibility of the transferring employer did not transfer to the transferee.

Transport & General Workers Union v James McKinnon, J R (Haulage) Ltd; 4 June 2001; EAT/103/01
EAT(Sc): Lord Johnston, Mr A J Ramsden and Mr R P Thomson

WAGES

A nightwatchman who was required to undertake duties during four hours of his 14-hour shift but was permitted to sleep or do other things during the remaining hours he was on the employer's premises claimed that, in paying him £210 a week for seven 14-hour shifts, the employer was in breach of the minimum hourly rate of pay prescribed by the Minimum Wage Regulations 1999. The employment tribunal dismissed his claim.

LORD JOHNSTON, allowing an appeal by the employee, said that the employment tribunal had taken the view that under regulation 15(1) of the 1999 Regulations the time worked by the employee would not exceed four hours per night and that that should be the proper measure of the extent to which remuneration was required under the Regulations. The appeal tribunal considered that regulation 15(1) did not apply to the employee's employment. What that regulation was designed to deal with was a situation where the employer specifically told the employee that during the relevant working period he was entitled to take so many hours off for sleep. A more apt analogy in the present case was an employer who required his employee to be available for work on his premises and it was his responsibility to provide work for him and if he did not do so he was still required to pay the employee because of the requirement for him to be on the premises. While it might be possible to enter into an average agreement for unmeasured work, if the employment was one to which the national minimum wage legislation applied, it had to be remunerated at the appropriate rate for those hours.

Wright v Scottbridge Construction Ltd; 4 April 2001; EAT/1050/00
EAT(Sc): Lord Johnston, Mr A G McQuaker and Dr W M Spiers

CONTINUOUS EMPLOYMENT

An employment tribunal rejected an employee's complaint of unfair dismissal on the ground that he had not been continuously employed for two years as required by section 108(1) of the Employment Rights Act 1996, where the employee had been dismissed, with others, from his job as a temporary gardener after five months because the money for their employment had run out, and re-employed six weeks later until his dismissal 22 months thereafter.

MR RECORDER UNDERHILL QC, allowing an appeal by the employee, said that the employment tribunal had rejected the employee's argument that the six-week gap in his employment had been "on account of a temporary cessation of work" within the meaning of section 212(3)(b) of the Employment Rights Act 1996, concluding that it was not planned as a temporary cessation of work and that not all those laid off were taken back. It was submitted on behalf of the employee that the tribunal had misdirected itself by treating as conclusive the fact, as it held, that the cessation of work was not "planned" to be temporary. That submission was well-founded. Whether or not a cessation of work was temporary had to be decided with hindsight, i e at the date when the employment finally ended and the question of continuity of employment fell to be determined. Accordingly, it was not sufficient for an employer to establish that at the time the employee was first laid off there was no firm intention to re-engage him at a particular time or at all. It was not submitted that the intention of the parties at the time was irrelevant. On the contrary, the decision was one of fact and degree in which all relevant circumstances were to be considered: those had to include the intention of the parties as to the duration of the lay-off. But the way in which the tribunal had expressed its reasons was not consistent with its having approached the issue in that way. The *only* factor it referred to was the intention of the parties at the time. In particular there was no consideration of the length of the actual period of lay-off relative to the periods for which the employee was employed, and such consideration was essential. Had the tribunal asked itself the correct question, the answer would have been plain. A cessation of work was "temporary" if it lasted only for a *relatively* short period of time. The employee had been employed for five and a half months prior to the lay-off and that employment had been followed by a further 22 months' employment. It was also material that he had been offered at least a reasonable prospect of re-engagement which eventuated shortly afterwards. So short a cessation, against that background, could realistically only be described as "temporary".

Fowler v Southend on Sea Borough Council; 23 April 2001; EAT/1021/98
EAT: Mr Recorder Underhill QC, Mr N D Willis and Mr K M Young

COSTS

A respondent employer was awarded the sum of £500 by way of expenses when an originating application by the applicant employee was struck out by the employment tribunal for want of prosecution and delay.

LORD JOHNSTON, allowing an appeal by the employer against the amount of the award, said that it was self-evident, on the face of the record, that an award of expenses was justified by reason of the applicant's conduct. An award of expenses was governed by rule 12 of the Employment Tribunals Rules of Procedure (Scotland) 1993. The employment tribunal had stated that, as it had no information as to the applicant's means, it was not appropriate to make an order under rule 12(3)(c) and, accordingly, awarded £500, the maximum payable under rule 12(3)(a). The employer submitted that the tribunal had misdirected itself by even addressing the question of means; and that it should have made an award under rule 12(3)(c). The appeal tribunal agreed. Whatever might be the purpose behind rule 12(3)(a), it should not detract from the general entitlement of a party otherwise entitled to expenses to receive the full amount due to them as compensation for the costs they had incurred. The notion of means was more relevant to any question of penalty, and an award of expenses was not, and should not be, regarded as penal. The protection available to the party against whom the order was made was taxation.

Lochgorm Warehouses v Gordon; 4 April 2001; EAT/1223/00
EAT(Sc): Lord Johnston, Mr G R Carter, Ms A E Robertson

DISABILITY DISCRIMINATION

At a hearing for directions on an employee's complaint of disability discrimination, the respondent employer accepted that the employee had a disability for the purposes of the Disability Discrimination Act 1995. Six months later, the employer applied to withdraw the concession. The application was refused by a chairman.

MS RECORDER COX QC, dismissing an appeal by the employer, said that it was argued that the employment tribunal only had jurisdiction to hear the employee's complaint if he was a person who

suffered from a disability within the meaning of the Act and that no party could, simply by making a concession, confer jurisdiction on a tribunal which it would not otherwise have. In order to succeed in a complaint of unlawful disability discrimination an applicant had to bring himself within the statutory provisions and surmount a number of hurdles. One of those was that it had to be proved that the applicant was a disabled person. In some instances, in the course of preparing for a hearing, a concession could be made by the employer that the applicant was a disabled person. Such a concession had clearly been made in the present case, at a time when the employer was represented by solicitors, and the parties had since then prepared for the hearing on the basis that that issue would not be a matter in dispute as between the parties. That was not a jurisdictional issue but rather an evidential one and there was no error by the chairman in concluding that the employer was bound by that concession and could not apply some six months later to withdraw it. In a letter to the employer's solicitors the chairman had said: "Concession or no concession the tribunal has jurisdiction to hear the applicant's disability discrimination case and the issue of disability will be an issue for the tribunal to decide having heard all the evidence." That accurately described the role of the employment tribunal at the forthcoming hearing. It did not mean that the refusal to allow the employer to withdraw the concession was erroneous.

Ovum Ltd v Tuckett; 17 May 2001; EAT/546/01
EAT: Ms Recorder Cox QC, Mr P R Jacques and Mr J R Rivers

MEDICAL REPORT

On a hearing for directions of an employee's claim of disability discrimination, an employment tribunal chairman directed the employee to disclose to the employer a report she had obtained from her general practitioner. He further directed that the employee would, if required, make herself available for examination by the employer's medical expert, setting out in the order a whole series of matters to be addressed by that expert, and ordered that copies of the expert's report should be filed with the tribunal and served on the employee. The employer sought confirmation that it was only required to disclose the report if disability remained an issue and the employer intended to rely on it. The chairman's reply was that it had to be disclosed in any event, and that the question of legal professional privilege did not apply.

LINDSAY J, dismissing an appeal by the employer on the issue of disclosure, said that the employer, rightly, asserted that legal professional privilege applied to tribunals as it did in civil courts generally. The Civil Procedure Rules 1998 had, however, introduced a rather different regime as to experts' reports. A distinction needed to be drawn between an advisory expert, whom a party consulted privately without any assistance from the court, and whose existence might even be unknown to the other side, and an expert tribunal witness who was instructed as such during the proceedings and whose role was known to the other side from the start. Here the tribunal's assistance had been invoked from the start, and the tribunal had itself specified the questions the expert was to address. The employee would know the identity of the employer's expert. In those circumstances, the nature of the order was such that the report would be a CPR Part 35 expert's report. The duty of the expert would be to the tribunal not simply the payor. That kind of report was not subject to legal privilege. The whole approach of the CPR was for "cards on the table". The employer would see the employee's report from her general practitioner; and, similarly, the employer was required to disclose its report. It might be said that that put the employee in a favoured position. She might have consulted any number of experts and chosen the only one in her favour. That inequality between the parties was capable of being overcome by requiring the employee, at the point of receiving a copy of the report from the employer, to disclose on oath every communication, received within the period beginning six months before the presentation of her originating application, which reported on any of the matters specified in the directions order. If she chose not to reveal any such reports, she would not see the employer's report.

Department of Health v Bird; 17 July 2001; EAT/668/01
EAT: Lindsay J, Mrs T A Marsland and Mr J R Rivers

RACIAL HARASSMENT

An employee who was black regarded as racially offensive a postcard sent to work by a white colleague which depicted a group of bare-breasted black African women with the comment "South Africa's answer to Mayfair". An employment tribunal found that the act of sending the card was race specific and upheld a complaint by the employee against his employer of unlawful race discrimination.

JUDGE PETER CLARK, dismissing an appeal by the employer, said that the employee's complaint was of direct unlawful race discrimination, and, by a combination of sections 1(1)(a) and 4(2)(c) of the Race Relations Act 1976, the employee had to show less favourable treatment on racial grounds that was to his detriment. In some cases—characterised as cases of racial harassment—that statutory process was short-circuited. Racial (or sexual) harassment was not defined by statute. The kind of conduct which constituted such conduct could be and usually was race (or sex) specific. As a practical matter, a true case of racial/sexual harassment would, by its factual nature, encompass the necessary ingredients of less favourable treatment, racial/sexual grounds and detriment. The difficulty arose where the facts did not

immediately lead to the conclusion that racial/sexual harassment had occurred. In those circumstances there could be no substitute for the words of the statute. Was the act of sending the postcard so obviously detrimental that it was disadvantageous to the applicant as a black employee by undermining his dignity at work? That question was to be answered by considering a combination of factors: the employee's subjective perception, the motive of the alleged discriminator (the sender of the postcard), how, objectively, the reasonable black employee would react to the treatment complained of and whether he would regard it as being to his detriment. Those factors were not inconsistent with the principle that the discriminator's motive or intention was irrelevant to proof of less favourable treatment on racial grounds, rather that, if bad motive was made out, the applicant's case became so much stronger. The tribunal's conclusion that the case was one of race specific behaviour amounting to unlawful discrimination was a permissible option. Objectively viewed, the postcard with its comment was racially offensive: it landed on the employee's desk with other, white, colleagues laughing; he was genuinely distressed by it; and that was not an over-reaction in the tribunal's view. It passed the racial harassment test.

Chief Constable of the Kent Constabulary v Kufeji; 4 May 2001; EAT/1135/00
EAT: Judge Peter Clark, Ms N Amin and Miss S M Wilson

REVIEW

A chairman promulgated a decision by which he dismissed, on withdrawal by the applicant, her claims for redundancy payment and breach of contract and stated that her claims for unfair dismissal, unpaid wages and insolvency payments remained live. The applicant sought a review of the decision, and the same chairman, sitting alone, allowed the application for a review and went on to confirm his original decision.

HOOPER J, allowing an appeal by the applicant against the review decision, said that the principal issue for resolution was whether the chairman, not having dismissed the review application summarily under rule 11(5) of the Employment Tribunals Rules of Procedure 1993, could himself conduct the review. The chairman, sitting alone, had the jurisdiction to make the original decision, that is to dismiss the claims if they had been withdrawn. Under rule 11(5) he had jurisdiction, sitting alone, to decide whether to dismiss the application for a review on the ground that it had no reasonable prospect of success. It might be thought that, having decided that he would not summarily dismiss the application for review, he would have the right to continue and review the decision, but that was not the case. Although rule 11(6) provided that a review should be heard by the tribunal "which decided the case", which must include the making of a decision as well as the deciding of a case, so far as rule 11(6)(b) was concerned, the decision to dismiss the applicant's claims was a decision made by the chairman acting alone under rule 13(8). It did not appear that the chairman had been specifically appointed by the President or the regional chairman to conduct the review. There was, however, a further difficulty. Rule 13 limited the circumstances in which a chairman acting alone could do any act required or authorised by the Rules to be done by a tribunal. One of the things a chairman sitting alone could not do by virtue of rule 13(8)(c) was to conduct a review of a decision under rule 11(11).

Fox v Willis Howells Financial Services; 1 March 2001; EAT/53/00
EAT: Hooper J, Lord Gladwin of Clee and Mr T C Thomas

REVIEW

An employment tribunal upheld an employee's claim of sex discrimination, preferring the evidence given on her behalf to that from her employers. A tribunal chairman, sitting alone, refused an application by the employer for a review, made on the grounds that new evidence was available and that the interests of justice required it, holding that a review would have no reasonable prospect of success.

NELSON J, allowing an appeal by the employer and remitting the matter of a review for the consideration of the full employment tribunal, said that the appeal was made on the ground, inter alia, that no chairman alone could or should have considered the application himself and concluded, by himself, that the review had no reasonable prospect of success. Rule 11(5) of the Employment Tribunals Rules of Procedure 1993 gave the chairman a very valuable power to act as a filter, to exclude those plain and obvious cases that had no reasonable prospect of success. That was a power that was necessary and that should not be unduly restricted. The only restriction that could be placed on it was that the chairman must exercise it judicially. It was submitted that, in the circumstances of the present case, where there was a factual, and closely contested, dispute that was at the heart of the matter, any decision on a review had to be decided by the whole fact-finding body. Reliance was placed on *Hancock v Middleton* [1982] ICR 416, 419G–H, as indicating that, where there was material which should be investigated, it was appropriate and proper for the matter to go back to the full tribunal for hearing, rather than being dealt with by the chairman alone. The appeal tribunal had to consider whether there was material for the employment tribunal to investigate that was so related to the facts of the case that it should be investigated by the full panel. To say that the whole tribunal should have considered the application to review would not be breaking new ground. It was simply a decision on the facts of a particular case. There had been a closely fought contest on the facts which the tribunal had expressly found difficult to resolve. The key was the fact

that the weight to be attached to the new material was difficult for anyone, save the original tribunal, to determine. It was much better determined by them than by the appeal tribunal and should have been determined by them rather than the chairman alone, given that it went to the very heart of the decision that was made.

Tooley v Brimelow; 19 June 2001; EAT/310/00
EAT: Nelson J, Mr D J Hodgkins and Ms B Switzer

CONSTRUCTIVE DISMISSAL

An employee complained to her employers in December 1999 that they had unilaterally altered her job specification. Thereafter she was off work due to stress caused by her work problems and had no contact with her employers until, in June 2000, she resigned because, though well enough to work, she felt unable to face returning to the altered job. An employment tribunal found that she had been constructively dismissed and upheld her complaint of unfair dismissal.

LORD JOHNSTON, dismissing an appeal by the employers, said that the employers submitted that the employee had, by her actions or inaction, affirmed the contract; that affirmation was a question of mixed fact and law; and that, by simply addressing itself to the question of whether it was reasonable for the employee to have delayed resigning, the employment tribunal had not addressed the correct question. It was important to emphasise, on the question of affirmation in the face of a breach of contract justifying repudiation of the contract by the employee, that it was only the employee who could effect affirmation and that it could be done either positively, in the sense of a positive acceptance whether by word or act, or impliedly provided that the conduct of the employee pointed unequivocally to such an acceptance. Delay was obviously a factor in considering whether that had been established, but it was necessary to examine the reasons for that delay in order to determine objectively whether affirmation had in fact been established on an implied basis. In the present case the reason for the employee's illness was, effectively, the circumstances surrounding what the tribunal had categorised as a fundamental breach of contract. The employers neither related the illness to that situation nor took any steps during the period in question to indicate to the employee that they were prepared to address her grievances. Thus, when fit for work, the employee found herself in precisely the same position as she had been in when the breach of contract materialised. Against that background, it was entirely reasonable for the tribunal to conclude that there had been no affirmation by the employee.

Bruce Anchor (Scotland) Ltd v Turbert; 12 September 2001; EAT/455/01
EAT(Sc): Lord Johnston, Mr G R Carter and Ms A E Robertson

CONSTRUCTIVE DISMISSAL

An employment tribunal rejected an employee's claim that by failing to provide her with work to do, in the course of 1999, her employers were in breach of a fundamental term of her contract of employment justifying her resignation on 30 September 1999, and held, on her complaint of unfair dismissal, that she had not been constructively dismissed.

LORD JOHNSTON, dismissing an appeal by the employee, said that the employment tribunal's decision was wholly defective when it came to its reasoning. The appeal tribunal was very conscious of the fact that it must not substitute its own views on the evidence for those of the tribunal which heard the matter and could only deal with errors of law. The appeal tribunal was, however, prepared in the present case, for practical reasons and without setting any precedent, to examine the findings of fact stated by the employment tribunal to determine whether the conclusion to which it came could be supported. In general terms, an issue might well arise as to whether an employer was under a duty to provide work for an employee so long as he was not breaking the employee's contract and continued to pay the employee. Redundancy might arise in a constructive dismissal situation, and a conclusion that the real reason for dismissal was redundancy was not necessarily inconsistent with a finding that the employee was nevertheless constructively dismissed. An employee, however, had no right to redundancy, and the issue of redundancy was peripheral, if not irrelevant, to the basic issue in the present case, namely, whether the conduct of the employer in not offering work to the employee but nevertheless requiring her to remain on the books because they valued her qualifications, was such as to entitle the employee to resign. The test in *Western Excavating (EEC) Ltd v Sharp* [1978] ICR 221 was that, whatever term of the contract was breached, it must in its breach go to the heart of the contract. Whether the matter was looked at from the context of an implied right of an employee to receive work from the employer during the currency of a contract of employment, or from the point of view of a mutual need for trust and confidence, there could be circumstances where the failure to offer work to an employee who was nevertheless being otherwise treated as an employee in terms of her contract could amount to a term capable of breach. The issue was one of degree. Failure to offer an employee work for a considerable period of time or at least without any definite limit of time could amount to a failure on the employer's part properly to perform the contract, thus creating a material breach entitling the employee to resign and claim constructive dismissal. However, on the evidence, the present was not such a case. The employer had an overriding requirement to restructure, to save money. The failure to offer the employee redundancy had probably triggered her resignation. But the time period involved did not amount to a sufficiently material breach, if any, of any obligation on the

employer to find work. The employment tribunal, therefore, came to a decision that was tenable on the evidence.

Cerinus v Bell College of Technology; 3 October 2001; EAT/218/01
EAT(Sc): Lord Johnston, Miss S B Ayre and Mr P M Hunter

COSTS

On a pre-hearing review of claims by 13 employees of unlawful deduction of wages, an employment tribunal chairman made an order under rule 7(4) of the Employment Tribunals Rules of Procedure 1993 requiring the applicant employees to pay a deposit of £50 each as a condition of pursuing their claims, on the ground that the claims had little prospect of success. At the substantive hearing of the claims the employment tribunal found against the applicants and, having considered the chairman's reasons for ordering the payment of deposits, made an award of costs under rule 12(7) for the payment of £100 by each applicant.

DOUGLAS BROWN J, allowing an appeal by the applicants against the order for costs, said that it was submitted that the tribunal's reasons for awarding costs did not deal with whether the applicants had behaved unreasonably in conducting the proceedings to a determination; that there had been an ordinary tribunal dispute where there was a conflict of evidence; that the applicants were entitled to know why it was said, if that was the decision, that they had behaved unreasonably; and that it was not sufficient to say that the reasons at the pre-hearing review were substantially similar to the reasons for the tribunal's decision. In the view of the appeal tribunal, the order for costs could not stand. Nowhere in the reasons did it appear that the words of rule 12(7) of the 1993 Rules, in relation to unreasonableness, had been addressed or how the matter had been decided. It was not enough to compare the decision on paper at the pre-hearing review with the decision of a tribunal after oral evidence. It was important to compare the two and to ask if they were substantially the same but it was not decisive of the matter. The question of unreasonableness had to be addressed. If it had been, the tribunal would have been obliged to have regard to its own reasons in dismissing the applications. Nowhere in the reasons was the bringing of the proceedings or the conduct of them criticised. It would be wrong to say, in the circumstances, that the applicants were unreasonable in persisting in bringing their claims. There had been a straightforward conflict of evidence; the result was not inevitable; and it was certainly not unreasonable to pursue the matter to a determination.

Gardiner v VAW Motorcast; 18 July 2001; EAT/262/00
EAT: Douglas Brown J, Mr B Fitzgerald and Mr G H Wright

EMPLOYMENT TRIBUNAL

An employee's claim of unlawful deduction of wages under section 23 of the Employment Rights Act 1996 was directed by an employment tribunal chairman to be heard by a chairman sitting alone in accordance with section 4(3) of the Employment Tribunals Act 1996. A chairman heard oral evidence on disputed facts and dismissed the claim. No reasons were given at the time for the decision that the claim should be heard by a chairman alone, but, after the employee had lodged an appeal, the first chairman said that there had not appeared to him to be a sufficient likelihood of a dispute on the facts to direct a hearing by a full tribunal and the second chairman said that nothing on the face of the pleadings led her to consider that the complaint should be heard by a full tribunal.

DOUGLAS BROWN J, allowing the appeal by the employee, said that in fact the pleadings showed that there was a stark factual conflict between the parties. In *Sogbetun v Hackney London Borough Council* [1998] ICR 1264 Morison J, giving the judgment of the Employment Appeal Tribunal, made a number of significant remarks which formed the clearest guidance as to how chairmen should approach their task under section 4 of the Employment Rights Act 1996. In the present case, both chairmen had fallen into error in not announcing or making known the reasons for their decision and in not seeking the views of the parties, as it was said in *Sogbetun*, at pp 1269D–E, 1270D, that they should. As to whether the first chairman dealt with the statutory requirements so that there was nothing left for the second chairman to do, the better view was that the listing chairman exercised discretion on the material before him, then when the matter came on for hearing there was a continuing duty to review the earlier decision, reflected in the words "at any stage of the proceedings" in section 4(5) of the 1996 Act; and, where the parties turned up with a number of witnesses, that ought to be a clear indication that it was a case where the advantage of a full tribunal should be had: see *Post Office v Howell* [2000] ICR 913, 919C–D.

Clarke v Arriva Kent Thameside Ltd; 25 July 2001; EAT/341/00
EAT: Douglas Brown J, Mr J R Crosby and Mr P R Jacques

PROTECTED DISCLOSURE

A consultant psychiatrist employed by a healthcare trust wrote to a nun employed as a psychiatric social worker because she was concerned that she wore a habit and headdress when visiting patients in the

community, and, when a meeting was called by the trust's nursing director to discuss the issue, the consultant spoke to a journalist, getting her views raised publicly in a newspaper article. The consultant's contract was terminated early and it was agreed that the trust would give her a reference. The reference provided set out in detail how she came to leave its employment and concluded that it would not be prepared to re-employ her. She complained to an employment tribunal that, for the purposes of section 47B of the Employment Rights Act 1996, she had been subjected to a detriment on the ground that she had made protected disclosures. The tribunal dismissed the complaint.

DOUGLAS BROWN J, dismissing an appeal by the applicant, said that the issues were whether the disclosures amounted to "qualifying" disclosures within the meaning of section 43B of the 1996 Act, whether, if they did, they had been made in accordance with sections 43C–43H, and whether, if so, the applicant had been subjected to a detriment on the ground that she had made those disclosures. The employment tribunal took the view that the applicant had no reasonable belief that the health and safety of any individual was likely to be endangered and had not, therefore made a "qualifying disclosure". It found that she had an ulterior motive, namely, the appointment of the nun per se, evidenced by a challenge to her competence, and that disclosure to the press was not reasonable in all the circumstances of the case: section 43G(1)(a)(e). The tribunal took into account that the disclosure was made to a journalist rather than a professional body and that the wearing of the habit was not a matter of urgency, as there was no evidence of any complaint or adverse patient reaction. Finally, the tribunal found that the applicant did not suffer a detriment as a result of the disclosure. There was an obligation to provide an accurate reference, and the reason for the contents of the reference was the breakdown in the working relationship between the applicant and members of her team. In other words, there was no causative link between the disclosure to the press and the reference even though it was mentioned in the reference. In the view of the appeal tribunal, the employment tribunal came to a correct conclusion in respect of all those matters. It was clear from the facts found that the applicant's reason for going to the press was for her own protection, largely her good name. Questions of good faith could be safely left to the experience and judgment of the employment tribunal.

Bright v Harrow & Hillingdon Healthcare NHS Trust; 26 July 2001; EAT/115/01
EAT: Douglas Brown J, Lord Davies of Coity and Mr P D Wickens

UNFAIR DISMISSAL

When dismissing an employee's complaint of unfair dismissal, an employment tribunal failed to specify which of several reasons relating to the employee's conduct was the actual reason for dismissal.

JUDGE PETER CLARK, allowing an appeal by the employee, said that it was necessary to set out the steps which an employment tribunal should take when considering the statutory questions raised by section 98 of the Employment Rights Act 1996. (1) What was the employer's reason for dismissal? The reason for dismissal was the reason, or set of facts or beliefs, held by the employer at the time of dismissal, that is on the effective date of termination of the employment. (2) Had the employer shown a potentially fair reason for dismissal? (3) If so, had the employer acted reasonably in treating *that* as a sufficient reason for dismissal? That question had to be determined in accordance with equity and the substantial merits of the case: section 98(4)(b). That question in turn raised a number of issues: (i) in a conduct case, whether the employer had carried out a reasonable investigation and whether he had reasonable grounds for holding an honest belief that the employee was guilty of the conduct alleged; (ii) whether the employer had carried out a reasonable procedure in arriving at the dismissal decision, and, if not, whether the procedural defect had been cured by a subsequent appeal which operated as a rehearing rather than a review of the original dismissal decision; (iii) whether dismissal was within the range of reasonable responses open to the employer, within which issue might arise the questions whether the employee had been treated more severely than other employees in comparable circumstances and whether the employee was or ought to have been aware that his conduct was liable to lead to his dismissal. Adopting those stages of inquiry, (1) there seemed to be three possible reasons for dismissal and it was unclear precisely on which reason the tribunal was judging the reasonableness of the dismissal under section 98(4). That was an essential finding, because it was *that* reason which had to be judged for its reasonableness and no other. (2) The relevant reason was that in the employer's mind at the time of dismissal, and it was accepted that that reason was a genuinely held belief related to the employee's conduct. (3)(i) There was no finding as to what investigation was necessary, bearing in mind the reason for dismissal, and there was no finding as to whether the employer had reasonable ground for his belief that the employee had misconducted himself. That was a material omission. (3)(ii) The question raised and not answered by the tribunal was whether, by upholding the original decision to dismiss for a different reason, the employers' disciplinary panel could be said to have cured a procedural deficiency found by the tribunal. (3)(iii) The tribunal had not addressed the question of reasonable responses at all; and more particularly it had made no findings as to whether cases of other employees were truly comparable or the employee's awareness.

O'Connell v Essex County Fire & Rescue Service; 12 July 2001; EAT/1334/99
EAT: Judge Peter Clark, Sir Gavin Laird and Miss S Wilson

[2001] ICR Part 11

ACADEMIC APPEAL

When her job ceased to exist, an employee who had been employed as a swimming instructor was found work as a classroom helper but paid at the higher rate of pay of a swimming instructor. After a complaint by the employee of unfair dismissal was upheld, the employment tribunal, at a remedies hearing in May 1999, made an order for her to be re-engaged as a primary helper or special needs assistant at the appropriate rate for the post.

NELSON J, dismissing the employee's appeal against the terms of the order, said that at a further remedies hearing the employment tribunal had held that it was not reasonably practicable for the employer to comply with the order for re-engagement and that, because of a failure by the employee to mitigate her loss, she not entitled to any compensation after November 1998. The employer submitted that in the light of that second decision, the time for appealing which was long past, the points raised in the appeal were purely academic. The appeal tribunal was satisfied that there could be no possible benefit to the employee in pursuing the appeal, and it would be inappropriate in such circumstances for it to hear the matter. While the appeal failed on that ground alone, it was necessary, in view of the absence of the employee, to consider her two grounds of appeal: that no reasons were given by the employment tribunal for the order that the employer should cease to continue to employ her in the lower grade post at the higher rate of pay; and that the tribunal erred in awarding arrears of pay for the 20 weeks prior to the hearing at the lower rate of pay. Though it was accepted that the extended reasons might not be as full as they might be, the summary reasons quite clearly stated why the tribunal was making the order. So, that ground of appeal would fall on the merits in any event. As for the second ground, while at first blush *Electronic Data Processing Ltd v Wright* [1986] ICR 76 was applicable, it was readily distinguishable. It was one thing to say that an employee was entitled to carry on in her old job at the old rate of pay until the new job was found, but quite another to say that, where another job had been found and the real unfairness was dismissing the employee rather than allowing her to carry on doing it, the employer should be bound for a considerable period after her actual dismissal to pay her on the basis of the anomalous previous higher rate. On the merits that ground would have failed in any event. The appeal tribunal were satisfied that it had been brought home to the employee that the appeal was solely academic and that an application for costs would be made, but she had nevertheless continued to pursue the matter and made the specific request that it be continued in her absence. In those circumstances, it was appropriate to award costs against her, and she would be ordered to pay £100.

Carter v Tower Hamlets London Borough Council; 22 June 2001; EAT/1073/99
EAT: Nelson J, Mr I Ezekiel and Mrs R A Vickers

DISABILITY DISCRIMINATION

Employers stopped paying sick pay in respect of absences from work for all employees under whose contracts such payments were discretionary. The applicant, who was disabled for the purposes of the Disability Discrimination Act 1995, made a complaint of disability discrimination. An employment tribunal held, inter alia, that payment of sick pay was a reasonable adjustment within section 6 of the 1995 Act and that, in refusing to pay him sick pay when he was off work, the employers had discriminated against the applicant by failing to make a reasonable adjustment contrary to sections 5(2) and 6 of the Act.

MISS RECORDER SLADE QC, when allowing an appeal by the employers on other grounds, said that the employers contended that sick pay was either not within the scope of section 6(1) of the 1995 Act or was excluded by section 6(11). Section 6 plainly applied to monetary benefits as well as to other arrangements. Were that not so there would have been no need for section 6(11). That provision excluded from the application of section 6 any benefit under an occupational pension scheme and other benefits payable in money or money's worth under a scheme or arrangement for the benefit of employees in respect of specified events including sickness. Further, regulation 3(2) of the Disability Discrimination (Employment) Regulations 1996 clearly contemplated that financial benefits fell within section 6. The natural meaning of "scheme or arrangement for the benefit of employees" in section 6(11) did not include payment of sick pay by an employer to an employee under a contract of employment. Such payments were made by the employer to, rather than "for the benefit of", the employee. Further, they were made pursuant to the contract of employment, rather than "under an arrangement". Section 6(7) did not preclude a finding which would require the payment of sick pay to the applicant, since the provision that "nothing in this Part is to be taken to require an employer to treat a disabled person more favourably" than others was made "subject to the provisions of this section". Thus the section 6(1) duty prevailed over section 6(7).

London Clubs Management Ltd v Hood; 18 September 2001; EAT/184/00
EAT: Miss Recorder Slade QC, Mr D J Hodgkins and Mr P M Smith

ILLEGAL CONTRACT

An employment tribunal declined jurisdiction to hear an employee's complaint of unfair dismissal on the ground that the employee had agreed to a contract that was tainted by illegality.

JUDGE ALTMAN, allowing an appeal by the employee, said that the employment tribunal of their own motion, quite properly, took the issue of whether the employee's contract of employment was legal, as the evidence seemed to indicate that he had received his pay without the employers accounting to the Inland Revenue for tax or National Insurance. The extent to which an employee was to be fixed with the illegality of a contract, so as to be disentitled from bringing any claim upon it, was a matter that had been considered many times by the courts. Knowledge of the ingredients might not necessarily give rise to knowledge that the Inland Revenue were being deprived or misled, particularly where the employee was receiving no more than he was entitled to. The employment tribunal, in setting out the principles of law, appeared to have attributed to the employee the burden of establishing lack of knowledge. It was not for the employee to show that he had no knowledge of the alleged illegality. The issue for the tribunal, if the matter was raised of their own motion, was whether they were satisfied that the employee did know of the illegality. It was clear that if the employee did not know of the illegality then he was entitled to rely on the contract. It was not so much whether the employee agreed to a contract as to whether he agreed to and knew about the illegality, and it appeared, on the face of their conclusions, that the employment tribunal had concluded that the fact of the improper amount being paid was sufficient to disentitle the applicant employee. If a party was to be disentitled from pursuing his normal statutory right to have his claim for unfair dismissal heard, on an important issue of legality, it was essential that the decision of the tribunal could be seen clearly in the face of the established legal principles. The issue would be remitted for rehearing.

Gyaniao v Design Corner Ltd; 15 June 2001; EAT/204/01
EAT: Judge Altman, Mr W Morris and Mrs D M Palmer

PRACTICE

An applicant's particulars of complaint stated that she had not been paid any redundancy money and notice or holiday pay by her former employer. The employer sent a fax to the tribunal saying that his business had closed and his only income was income support. The applicant faxed the tribunal from Greece, saying that the employer had not spoken to the Department of Trade & Industry and as a result they presumed he did not agree that she was entitled to redundancy money, and she asked the tribunal to fax her back if there would be a problem if she did not attend the hearing. The tribunal did not reply. Neither party attended the hearing and the complaint was dismissed on the ground that the IT1 did not give any substantive details in support of the claim.

JUDGE PETER CLARK, allowing an appeal by the applicant, said that, in dismissing the applicant's originating application, the employment tribunal fell into error in a number of respects. (1) It did not, on the face of the full reasons, consider adjourning the hearing. (2) If it did, then it failed to exercise its discretion judicially in circumstances where the applicant had faxed the tribunal the previous day, explaining the reason for her absence and inviting a response. She ought to have been advised of her right to seek an adjournment. (3) In not granting an adjournment the tribunal failed to take into account a relevant factor, namely, that the respondent having failed to enter an appearance no injustice would have been caused by granting an adjournment. (4) In the proper exercise of its discretion the tribunal ought to have granted an adjournment in the circumstances of the case. (5) The tribunal, before dismissing the application, was required to consider the originating material and any written representations. On the material before it (a) the applicant claimed she had been employed by the respondent for seven years and had been dismissed in circumstances amounting to redundancy without a redundancy payment; (b) the respondent had not entered an appearance, nor had he disputed the claim; (c) the applicant had not been asked for further particulars of her claim, either by the respondent or by the tribunal of its own motion. The claim had been accepted. In those circumstances no reasonable tribunal, properly directing itself, could dismiss the application. The case would be remitted for rehearing and the applicant directed to serve full particulars of her claims.

Mills v Johnson; 19 July 2001; EAT/1107/00
EAT: Judge Peter Clark, Mr J R Crosby and Mr D A C Lambert

REDUNDANCY

A part-time teacher, who was told that her teaching hours were to be substantially reduced because of cuts in part-time teaching posts, though the teaching hours for her particular subject were to remain the same, was held by an employment tribunal to have been fairly dismissed by reason of redundancy.

MR RECORDER LANGSTAFF QC, allowing an appeal by the employee, said that by virtue of section 139(1)(b) of the Employment Rights Act 1996 an employee was to be taken to be dismissed by reason of redundancy if the dismissal was wholly or mainly attributable to "the fact that the requirements of that business . . . for employees to carry out work of a particular kind . . . have ceased or diminished . . ." Though there was no specific requirement in the 1996 Act for there to be any consultation in respect of

redundancy, it was well recognised that determination of whether a dismissal was fair was likely to turn significantly on the question of whether there had been sufficient consultation. The employee argued, first, that there was no redundancy; that there had been no reduction in the requirements for work "of a particular kind"; and that those words could not mean simply teaching but must mean teaching of her subject. The employment tribunal had not expressly said what constituted "work of a particular kind". To determine whether that was necessary required resolution of the question whether the work referred to in the statute was that of the employee who was dismissed as being redundant. In other words, if an employer found that he no longer required employees to perform task A, and because of that dismisses employees engaged on task B, was the dismissal of the latter by reason of redundancy? Untrammelled by authority, the appeal tribunal would conclude that the wording of the statute envisaged that the "work of a particular kind" did not necessarily have to be work of the sort which the dismissed employee had been doing. Any potential unfairness that might arise in a "bumping" situation would be resolved by section 98(4) of the Act. *Murray v Foyle Meats Ltd* [1999] ICR 827 emphasised that the language of section 139(1)(b) was simplicity itself. It asked two questions of fact: (1) whether one or another of various states of economic affairs existed and (2) whether the dismissal was attributable, wholly or mainly, to that state of affairs. That was a question of causation. It followed that if the tribunal found as a fact that the requirements of the employer's business for employees to carry out work of a particular kind (part-time teaching) had ceased or diminished, and if they found as a fact that it was by reason of that reduction in requirement that the employee was dismissed, they had asked themselves all the questions the statute required. They did not need to go further to ask whether the reduction in the requirement of the employer was for work of the particular kind which the employee herself did. Whether her dismissal was fair, however, depended on what the employment tribunal made of the consultation process, and the tribunal's view that the employer had warned the employee of the possibility of reductions in working hours, and consequent redundancy, which appeared to have been material in assessing fairness, was erroneous. The decision on fairness could not stand and the matter would be remitted for reconsideration.

Stankovic v City of Westminster; 17 October 2001; EAT/696/00
EAT: Mr Recorder Langstaff QC, Mr J R Crosby and Lord Gladwin of Clee

TIME WORK

An employment tribunal held that employees of an organisation which supplied nurses on a 24-hour emergency basis were workers engaged in time work, in accordance with regulation 15(1) of the National Minimum Wage Regulations 1999, when they were awake and waiting to deal with calls at home during night time hours.

JUDGE ALTMAN, dismissing an appeal by the employer, said that, referring to *Sindicato de Medicos de Asistencia Publica v Conselleria de Sanidad y Consumo de la Generalidad Valenciana* (Case C-303/98) [2001] ICR 1116, the employer argued that where a worker was employed at home, it was unrealistic to suggest that, merely because he was available to do the tasks to which he had been assigned by his employer, that was being at work. The appeal tribunal had some sympathy with that argument. There did seem to be a qualitative difference between doing assigned tasks while at home and doing assigned tasks while at work. The essential task of a tribunal in seeking to apply the Regulations, or an employer in seeking to adhere to them, was to look at the ingredients of the particular case and the type of work involved to see if they could properly be described as work. In the present case the types of thing to be looked at were the nature of the work in its substance; the extent to which the employee's activities were restricted when not actually answering the telephone; the way in which the parties approached their mutual obligations and the way remuneration was calculated were not conclusive but where pay was calculated by reference to a shift that provided some illustration of the nature of the obligation; and the extent to which the period during which work was performed was readily ascertainable. In the present case the employee, while working at home, was not able to pick and choose the periods of time during the night when he would answer the telephone; there was a continuing obligation to be available throughout the night, and that was an important element in considering what was work. The variable nature of the number of telephone calls, wholly unrelated to the pay that was involved, also tended to dissociate the actual periods of answering the telephone from the measurement of the hours of work. On the facts found, the employment tribunal were entitled to conclude that the employees were working. To extract from the night time hours those few minutes when each phone call took place and say that that was work but that the rest was not was really only selecting one type of work in preference to another, by reference to the degree of concentration required. In the context of the facts, there was only a degree of difference between holding oneself ready and obliged to answer the telephone and actually doing so.

British Nursing Association v Inland Revenue; 8 June 2001; EAT/1387/00
EAT: Judge Altman, Mr D A C Lambert and Mr P A L Parker

COMPENSATION

An employment tribunal found that, although the applicant had been dismissed for redundancy, the dismissal was unfair because of there had been no consultation prior to the redundancy. It concluded that, had proper consultation taken place, he would have been employed for a further two weeks and it awarded him two weeks' wages as compensation.

JUDGE REID QC, allowing an appeal by the applicant, said that the applicant first argued that there should have been a finding that the dismissal was unfair, not simply for lack of consultation, but also because there should have been a warning of his impending redundancy seven months earlier when the employer knew it was inevitable so that he could have looked for alternative employment. In looking at compensation, where a dismissal was unfair by reason of an employer's failure to go through the appropriate steps before making an employee redundant, the tribunal was not put in any form of straitjacket. Under section 123 of the Employment Rights Act 1996 it had to look at what was just and equitable in all the circumstances. In order to do that in the present case, one had to see if there was a separate duty to warn apart from the duty to consult. Looking at the passages cited in support, in *Rowell v Hubbard Group Services Ltd* [1995] IRLR 195, *Williams v Compair Maxam Ltd* [1982] ICR 156 and *Polkey v A E Dayton Services Ltd* [1988] ICR 142, 162–163, the proposition that there was a separate duty to warn was not made out. Warning and consultation were part of the single process of consultation which began with the employee being given notice that he was at risk. The second ground of appeal was that, in awarding only two weeks' wages, the tribunal incorrectly applied the process for assessing compensatory awards. Although, as the employment tribunal found, the consultation process would not have taken more than two weeks, it did not follow that that process should be taken to have started at the date of dismissal, nor did it follow that the appropriate method of calculating compensation was by assuming that, had a consultation process started on the date of dismissal, the applicant would have been employed for a further two weeks. The reason for the unfairness was the failure to start the consultation process timeously or at all, with the result that he was disadvantaged in seeking another job. In the judgment of the appeal tribunal, he could have started that process 10 weeks earlier and, had he done so, was likely to have had a new job substantially earlier. The employment tribunal had allowed itself to be forced into a straitjacket by what had become a conventional method of expressing the compensation payable in non consultation redundancy cases where the court had held that, had the employer acted properly, the employee would have had a further two weeks' tenure and that that was the measure of his loss. It had to be remembered that the award under section 123 was to be calculated on a more general basis. The applicant lost the chance of being re-employed substantially earlier than he was and the appropriate measure of compensation (in the absence of evidence as to his pay in his new job) was 10 weeks' wages.

Elkouil v Coney Island Ltd; 30 October 2001; EAT/520/00
EAT: Judge J R Reid QC, Mr P R A Jacques and Mr J C Shrigley

COMPENSATION

After 30 years' employment, an employee was selected for early retirement and received a lump sum of £151,474 under the employer's early retirement scheme, the purpose of which was "to provide a superannuation gratuity to participants in respect of past service with the company" and which stated that it conferred "no contractual or other rights or entitlements on any employee". An employment tribunal upheld a complaint by the employee that he had been unfairly dismissed and directed that the employer should be given credit for the payment made to the employee under the early retirement scheme.

JUDGE REID QC, dismissing an appeal by the employee, said that the employee submitted that the sum paid under the scheme should be considered to be a contractual entitlement, which should be left out of account, because it would have been irrational or perverse not to have awarded him the sum. But the words of the scheme itself were paramount and clear; the scheme was, as it said it was and as the employment tribunal concluded, discretionary, the fact that payments under it were described as "pension" being neither here nor there. The cases relating to the taking into account of pensions in personal injury cases were not of assistance, because what one was concerned with in the present case was a statutory compensation scheme not a claim for damages at common law. The requirement in section 123 of the Employment Rights Act 1996 was to determine "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer". The decision as to whether the payment ought to be taken into account was one for the employment tribunal and there was no error of law in their doing so. Further, they were correct to do so. It was a non contractual payment which would not have arisen but for the employee's dismissal, and the loss he suffered was undoubtedly diminished by the payment. Though the extent of that loss might be affected by the taxation treatment of the sum

received, that was a question of the quantum to be taken into account; but the tribunal were right, as a matter of justice and equity, to take into account a payment under the scheme in determining compensation.

Hodes v Marks & Spencer plc; 1 November 2001; EAT/716/00
EAT: Judge J R Reid QC, Mr H Singh and Mr R N Straker

DISABILITY DISCRIMINATION

After nearly 40 years working for his employer, an employee who was profoundly deaf and unable to speak, and who communicated through people who knew him well, was selected for redundancy with six others. Rejecting his claim of disability discrimination, an employment tribunal found that the employee had had the greatest difficulty in understanding the situation when he was told he was being dismissed and had been bitterly distressed at losing his job, but that the cause of his distress was the loss of employment and not any perception that he was suffering from discrimination.

JUDGE REID QC, allowing an appeal by the employee, said that the argument advanced on behalf of the employee was that his selection for redundancy was less favourable treatment within the meaning of section 5(1) of the Disability Discrimination Act 1995 because he was marked down in certain categories because of his disability; alternatively, that the selection criteria placed him at a substantial disadvantage in comparison with non disabled employees so that the employer's failure to adjust them to remove the disadvantage was a breach of section 5(2). The employment tribunal said that, even if he had been marked up to an average mark in the relevant categories, he would still have been one of those made redundant and, therefore, he had not been treated less favourably for a reason relating to his disability. But the position was that the employee was put under a disadvantage because, in relation to the specific categories, his disability affected his marks in a way that it did not affect the marks of those who were not suffering from a disability and because no steps were taken to make any adjustment to take account of the detriment he suffered by being marked down. Accordingly, the tribunal was wrong in holding that there was no discrimination against the employee. There was no suggestion that it would have been impractical to deal with the detriment by some appropriate marking uplift. That said, the fact of the matter was that the employee would, as the tribunal found, have been selected in any event for redundancy. In those circumstances, the appropriate response was to make a declaration that, by applying the criteria it did, the employer discriminated against the employee on the basis of his disability. The second issue in the appeal related to the failure of the employer to take account of the employee's disability in the manner he was informed of his dismissal. The position was that he was not afforded any special treatment. He was, with the others dismissed, told of his dismissal at a single meeting. The tribunal was in error in saying that there was no detriment suffered. It was unlawful for an employer to discriminate against a disabled person whom he employed "by dismissing him or subjecting him to any other detriment", and there was a detriment in bringing a profoundly deaf person in with a group of others who can hear and dismissing him in circumstances where he had difficulty in comprehending what was going on. It was something that could easily have been dealt with by an appropriate adjustment. But it was not a case where it could be said that there had been an injury to feelings by reason of the discrimination and, again, the appropriate remedy was simply to make a declaration.

Berry v GB Electronics Ltd; 17 October 2001; EAT/882/00
EAT: Judge J R Reid QC, Mr A E R Manners and Mr A D Tuffin

EXTENSION OF TIME

An employer presented its notice of appearance to an employee's complaint of unfair dismissal, a month out of time, on the day before that fixed for the hearing. The employment tribunal refused the employer's application for an extension of time, on the ground that the employer had simply not bothered to give the matter any attention until made aware of the hearing, and the tribunal went on to uphold the employee's complaint.

MR RECORDER UNDERHILL QC, allowing an appeal by the employer, said that the essential ground of appeal was that the tribunal had failed to follow the guidance given by the appeal tribunal in *Kwik Save Stores Ltd v Swain* [1997] ICR 49, 54–55, where Mummery J set out the factors to which an employment tribunal ought to have regard in considering an application for an extension of time for entering a notice of appearance. Mummery J pointed out that the length of, and explanation for, the delay would always be an important factor and might be decisive, but also pointed out that it was not the only factor to be considered. The employment tribunal had not approached the exercise of its discretion in accordance with those guidelines and had only considered the first of the factors identified. It had not addressed the question of prejudice or, therefore, the apparent merits of the employee's claim and employer's defence. It followed that its decision was flawed. It was submitted that the guidance in *Kwik Save Stores* was no longer authoritative because, since it was decided, the time for service of a notice of appearance had been extended from 14 to 21 days, but a modest increase in the period allowed could not have affected the questions of principle reviewed in *Kwik Save Stores*. The appeal tribunal had come to the

conclusion that it was not possible to say, in the circumstances of the case, that the employment tribunal could legitimately only have exercised its discretion against the employer and, accordingly, it was obliged to remit the application to the employment tribunal for reconsideration. In considering the issue of prejudice, the tribunal could take into account the fact that any award against the employer would [as the tribunal had found] be subject to a very substantial reduction for contributory conduct.

Polygon Corporation v Tregunna; 14 November 2001; EAT/1194/00
EAT: Mr Recorder Underhill QC, Mrs A Gallico and Mrs T A Marsland

PRACTICE

An employment tribunal, upholding complaints by two employees that they had been unfairly dismissed for asserting that their employer had infringed a statutory right, had regard in its reasons to three unreported cases, which had not been cited by the parties' advocates and on which they had not had any opportunity to comment.

JUDGE SEROTA QC, allowing an appeal by the employer, said that, had the three authorities been considered by the advocates, their submissions might have focused on the relevant evidence and the findings of fact that the tribunal should have made. It was not possible to say what the decision might have been in those circumstances. The right to a fair hearing required notice of all material matters of fact and law to be given to the parties if the employment tribunal wished to make determinations on points not argued by the parties. The consideration of the three authorities by the employment tribunal had been material to its decision, since, even though no complaint was made as to the principle to be deduced from them, the application of the principle to the facts had been highly material. Where an employment tribunal considered that an authority was relevant, significant and material to its decision, but had not been referred to by the parties, it should refer that authority to the parties and invite their submissions before concluding its decision. That was more than mere good practice. Failure to do so might amount to a breach of natural justice and of the right to a fair hearing. The failure of the employment tribunal to invite submissions from the parties on the three authorities had doubtless been inadvertent. The tribunal might not have recognised the particular significance it attached to the authorities. There had, however, been significant procedural unfairness and the matter would be remitted to enable the employment tribunal to hear submissions on the three authorities and on any findings of fact that either party might wish the tribunal to make in determining the question in issue. Even though it would have been open to the employer to seek a review of the tribunal's decision, its failure to do so did not preclude its right to appeal.

Albion Hotel (Freshwater) Ltd v Silva; 15 November 2001; EAT/375/00
EAT: Judge D Serota QC, Lord Davies of Coity and Mr I Ezekiel

PRACTICE

Following her resignation from her employment, an employee applied to an employment tribunal for one week's pay in hand and two days' holiday pay for the year 1999 to 2000, to which she claimed to be entitled. The tribunal dismissed both claims but went on to award her three weeks' holiday pay for the year 1998 to 1999.

JUDGE PETER CLARK, allowing an appeal by the employer, said that the Employment Appeal Tribunal had adjourned the preliminary hearing of the appeal on terms that the employer produce certain PAYE records. The employer had complied with that direction, and the employee had written to say that she had been surprised by the award as she had not applied for holiday pay for the previous year as she could not prove either way whether she had been paid it. It was clear that both parties had been surprised by the award of three weeks' holiday pay for a period in respect of which no claim had been made. It was essential if an employment tribunal was to raise a claim not advanced by an applicant that both parties, particularly the respondent, were given a proper opportunity to deal with it both in evidence and in argument. In the circumstances of the present case there had been a breach of natural justice that required the appeal to be allowed and the employment tribunal's award to be set aside. The question then arose as to what should be done. Bearing in mind the principle of proportionality—the award was just under £400 –and that, on the material before the appeal tribunal, it appeared that the applicant had received all the holiday pay to which she was entitled for the year 1998 to 1999, the case would not be remitted; instead, the originating application would be dismissed.

Phoenix Catering Ltd v Mayers; 19 October 2001; EAT/302/01
EAT: Judge Peter Clark, Mrs R A Vickers and Mr G H Wright

PRACTICE

In 1997 Companies House advertised internally for a registrar of companies for Anguilla, pursuant to an agreement with the Department of International Development. Two employees applied for the post and, in August 1997, the unsuccessful applicant made a complaint of racial discrimination and

victimisation against Companies House and the department. By a decision, on a preliminary issue as to jurisdiction, sent to the parties on 6 February 1998, the industrial tribunal held it had no jurisdiction, because (i) a person posted abroad would not be a person employed at an establishment in Great Britain for the purposes of the Race Relations Act 1976, and (ii) the interview panel, which consisted of the director of financial services in Anguilla, a Foreign Office official and a senior officer in the Department of Trade and Industry, were not employees or agents of Companies House. The applicant appealed and his complaints were remitted for a fresh preliminary hearing, at which, by reasons dated 12 April 2000, the employment tribunal decided that the decision not to select the applicant was not treatment by Companies House within the 1976 Act, but, if it was, the tribunal would have jurisdiction.

DOUGLAS BROWN J, allowing an appeal by the applicant, said that the applicant had submitted to the tribunal that, where a benefit in the form of secondment was afforded to an employee, the employer would be liable for refusing such benefit on racial grounds by reason of section 4(2) of the 1976 Act and an employer could not avoid the reach of section 4 by outsourcing its decision-making. It was submitted, alternatively, that the interview panel were acting as agents for the employer during the selection process. The employment tribunal had made detailed findings of fact as to how the suitable person for secondment had been selected and come to the conclusion that the employer was not responsible, that its role was confined to providing nominees for secondment. Nowhere in the reasons was there any consideration of counsel's arguments, particularly on the issues of vicarious liability, liability for the acts of third parties or agency. It was accepted that those were fundamental issues that needed to be addressed. Looking at the tribunal's reasons, it was not possible to tell what view the tribunal formed of those arguments. That failure represented a serious flaw in the decision-making process, and the decision could not stand. The application was now very stale. If the preliminary issue was heard again a final resolution would be two or three years away. There was going to be a full hearing on the victimisation issue in any event. The most expeditious method of dealing with the application was for all matters to be dealt with at the one hearing and the case would be remitted accordingly.

Willie v Companies House; 3 August 2001; EAT/652/00
EAT: Douglas Brown J, Mrs A Gallico and Mr P R A Jacques

AMENDMENT

At the hearing of an employee's complaints of unfair dismissal and race discrimination, the employment tribunal ruled that it would hear evidence on the merits of the complaints as well as on proposed amendments submitted by the applicant before deciding on the admissibility of the amendments and whether, if necessary, to extend time to amend the originating application to add further allegations of discrimination. The tribunal went on to find in the applicant's favour on the race discrimination claims, but found that he had not been unfairly dismissed, and, while rejecting some of the amendments, extended time to allow an amendment in relation to a disciplinary process on the ground that the employers would not be prejudiced as the matter was well documented.

JUDGE SEROTA QC, allowing an appeal by the employers, said that the employers submitted that the tribunal had only considered questions of prejudice in deciding to permit the amendments, and a number of factors had been submitted to the tribunal as being relevant to that decision. The employment tribunal was not wrong in exercising its discretion to decide to hear evidence on the merits of the case generally as well as evidence relating to the proposed amendments and then to rule on admissibility later. Nevertheless the fact that the tribunal heard evidence on the substance of the complaint and concluded that the applicant had been treated badly might have blinded it to the need to consider other circumstances which were or might have been relevant to the application to amend. While guidance given in *British Coal Corpn v Keeble* [1997] IRLR 336 should not be regarded as statutory guidance and it would be wrong to seek to cut down the wide discretion given to tribunals to consider all the circumstances and reach decisions which were just and equitable, the approach of the appeal tribunal in that case was sensible guidance. It required tribunals to focus on *all* the circumstances of the case, a number of which required specific consideration, including the length of delay, the reasons for the delay and whether those reasons were good. There was a growing recognition of the importance of parties adhering to time limits, and, while failure to comply with a time limit without good reason was not necessarily of itself a reason to refuse to extend time, the tribunal had apparently failed to have regard to the delay, the reasons for the delay and the fact that there appeared to have been a conscious decision by the applicant to take no action despite having received legal advice. It might well be that the applicant would be in a position to provide a satisfactory explanation which would enable the tribunal to exercise discretion in his favour. However, it seemed that the tribunal was in error in concentrating on the question of prejudice alone. The appropriate course was for the matter to be remitted to be heard by another tribunal.

Direct Line Accident Management Ltd v Zaidi; 25 September 2001; EAT/384/00
EAT: Judge D Serota QC, Mr W Morris and Mrs D M Palmer

CONTEMPT

In the course of preparing an appeal against a decision of an employment tribunal, the applicant produced a document, described by his then solicitors, as "our client's transcript of part of the original tribunal hearing". The employment tribunal upheld the respondent's contention that the document was a transcript of an unauthorised tape recording of the proceedings and a contempt of court under section 9 of the Contempt of Court Act 1981. When no explanation whatsoever was given by the applicant as to how the document came into existence, the employment tribunal concluded that the making of the recording was scandalous conduct, and exercised its discretion to strike out the proceedings.

JUDGE PUGSLEY, dismissing an appeal by the applicant, said that, as a general proposition, it would not be right to strike out a case because someone had taped part of the proceedings. However, where, as in the present case, there was an obdurate refusal to explain what had happened, to admit it on overwhelming evidence, it was well within the discretion of a tribunal to take the course of striking out. The employment tribunal, in other parts of their reasons, had taken a robust view of allegations made against chairmen in their area and not struck out the applicant's case. But, faced as they were with remorseless and inexorable evasiveness on what was clearly a transcript, they were entitled to take into account not only that a transcript had been made by a tape recorder but the applicant's total refusal to accept or apologise for that. The refusal to provide an explanation for a prima facie breach of section 9 of the Contempt of Court Act 1981 was so unreasonable that the claim could have been struck out perfectly properly on that basis in any event. The appeal would be dismissed on that basis, and only if that decision were to be reversed on appeal would the following issue arise. The employment tribunal had considered that a victimisation claim advanced by the applicant was indistinguishable from that in *D'Souza v Lambeth London Borough Council* [2001] EWCA Civ 794, where the Court of Appeal had concluded that an employment tribunal had had no jurisdiction to consider a claim by a former employee alleging discrimination in non compliance with an order for reinstatement. The appeal tribunal had been informed that leave to appeal to the House of Lords had been received in *D'Souza's* case. It would be appropriate to stay the appeal on that issue until the House of Lords had given judgment in *D'Souza*. It would be quite wrong for the appeal

ribunal prematurely to seek to resolve an issue when there was a real possibility that the House of Lords vould give a definitive judgment on it.

Neckles v Yorkshire Rider Ltd; 18 January 2002; EAT/1267/01
EAT: Judge Pugsley, Mrs R Chapman and Mr P R A Jacques

DISABILITY DISCRIMINATION

An employment tribunal found that a disabled employee had not been unlawfully discriminated against vhen he was dismissed for prolonged absence from work. The tribunal found that the employer had lemonstrated a genuine willingness to consider various options that might assist the employee in returning o work, but that he was not fit to return to work and there was no suggestion when he might be likely to do o and that the dismissal was justified under section 5(3) of the Disability Discrimination Act 1995.

LORD JOHNSTON, dismissing an appeal by the employee, said that section 5(3) of the 1995 Act equired the tribunal to be satisfied that the reasons for the discriminatory act being justified were both naterial and substantial in the circumstances. There was a useful analysis of the section by Arden LJ in *Post Office v Jones* [2001] ICR 805: there had to be a causal connection between the discriminatory act and he justifying circumstances which had to be material in the sense of relevant, while substantial meant imply more than de minimis. It was important to note from *Jones's* case that the justification need not epend on the tribunal being satisfied that all possible protection had been given to the employee. It was lso important to note, given that the discriminatory act related to how the employer treated the employee, hat knowledge of disability was not necessarily an essential element. In so far as the appeal tribunal might ave suggested in *Quinn v Schwarzkopf Ltd* [2001] IRLR 67 that justification could never occur if the mployer was ignorant of the fact of disability at the relevant time, that went too far. What mattered was o analyse the treatment meted out by the employer. The reason for the dismissal in the present case, as far s the employer was concerned, was the sickness record, failure to respond by correct reporting procedures nd, more importantly, the failure substantially to respond to the employer's various attempts to try and ccommodate the employee in retaining his employment. It was also very important to bear in mind that at he time of dismissal the employee was not fit for work, nor was it known when he was likely to be so. In hose circumstances, the tribunal reached a correct decision. The reasons for dismissal were both material nd substantial and directly related to the dismissal.

Callagan v Glasgow City Council; 11 September 2001; EAT/43/01
EAT(Sc): Lord Johnston, Miss S B Ayre and Miss A Martin

REVIEW

In October 1995 at a pre-hearing review of an applicant's sex discrimination complaint, an industrial ribunal chairman ordered the applicant to pay a deposit of £100 as a condition of being permitted to ontinue. In November 1995 the chairman refused to review his decision and, in December 1995, struck ut the complaint, the applicant having failed to pay the deposit. Appeals by the applicant against the eposit and striking out decisions were rejected by the appeal tribunal, but in April 1997 the President of he appeal tribunal directed him to apply to the industrial tribunal to consider his new evidence and review he deposit order. In May 1997 the tribunal chairman refused to review his deposit decision of October 995 on the ground that the proceedings had been struck out, his order to that effect having been upheld by he appeal tribunal, and the tribunal was functus officio.

MAURICE KAY J, dismissing an appeal by the applicant against the chairman's refusal to review of May 1997, said that it was abundantly clear that an order for a deposit under rule 7(4) in Schedule 1 to the mployment Tribunals (Constitution and Procedure) Regulations 1993 was not susceptible to review nder rule 11, which provided the general power of review, because rule 11 only applied to a "decision" nd the definition of "decision" in regulation 2 of the 1993 Regulations expressly excluded "any other nterlocutory order or any other decision on an interlocutory matter". On the other hand there was a line f authority to the effect that, in some circumstances, a deposit decision was susceptible of review under ule 16(1). It was the applicant's case that it remained open to the employment tribunal to review the eposit decision on the basis of a material change in the factual circumstances even after the strike out hich had been subsequently upheld on appeal: *Kuttapan v Croydon London Borough Council* [1999] RLR 349. The position was, however, that, the strike out order having been *lawfully* made, there was no risdiction in the employment tribunal to revisit the deposit order pursuant to the Regulations. ule 16 was not a gateway to "directions on any matter arising in connection with" proceedings which had ong since been the subject of a lawful strike out order. That was the difference between the present case nd *Kuttapan*, in which the strike out order had been wrongly made. The respondent employers were orrect in submitting that the tribunal chairman was right to decide that he was functus officio: the mployment tribunal had no jurisdiction to consider reviewing the deposit decision, since it was compelled

to regard its decision on the strike out as exhausting its jurisdiction to hear applications in respect of the applicant's complaint: *Aparau v Iceland Frozen Foods plc* [2000] ICR 341, 350.

Armstrong v Devon County Council; 16 January 2002; EAT/484/96
EAT: Maurice Kay J, Mrs R Chapman and Lord Gladwin of Clee

SEX DISCRIMINATION

An employers' staff code for male employees forbade long hair and pony tails, whereas female staff were required only to be neatly groomed. An employment tribunal dismissed a complaint of sex discrimination by a male employee, holding that the requirement was one of conventionality of appearance and that the treatment accorded to male employees was not less favourable than that accorded to female employees.

MR RECORDER LANGSTAFF QC, dismissing an appeal by the employee, said that the central issue between the parties was whether or not the tribunal drew any conclusion as to whether the length of hair or the wearing of a pony tail was within the bounds of what was unconventional. Although the tribunal had not said so in terms, it was implicit in its decision. In looking at a dress standard a tribunal had first to ask whether or not there was a contractual requirement for the standard. Secondly, it had to ask, so far as discrimination on the ground of sex was concerned, whether taken as a whole the dress code was discriminatory in that the treatment accorded to male employees was less favourable than that accorded to females, or the reverse. As part of that question, the tribunal had inevitably to examine the particular constituent elements of the dress code. That was not to say that men and women had to be treated identically if there was to be no discrimination. It was for the tribunal to decide the scope of its inquiry, but if the tribunal was examining a dress code as a whole it would inevitably wish to view the component parts in order properly to assess the whole. That was no more than saying, in different words, what was said by Phillips LJ in *Smith v Safeway plc* [1996] ICR 868, 876, which was binding on the appeal tribunal.

Fuller v Mastercare Service & Distribution; 24 September 2001; EAT/707/00
EAT: Mr Recorder Langstaff QC, Mr P Dawson and Mr B V Fitzgerald

STATUS OF EXECUTORS

An employment tribunal sitting in Scotland held that it had no jurisdiction to hear complaints of breach of contract and disability discrimination brought by the executors of a deceased claimant on the ground that there was no statutory equivalent to section 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934, which enabled personal representatives in England and Wales to bring such complaints, applicable in Scotland.

LORD JOHNSTON, allowing an appeal by the executors, said that the common law of Scotland had for centuries admitted the right of an executor to pursue claims on behalf of the deceased with some exceptions. The question was whether the discrimination statutes provided one of those exceptions. The appeal tribunal was, therefore, required to search the statute to discover whether that was the case. The shoe pinched tightest with regard to the use of the word "person" [who could bring a complaint] in section 8 of the Disability Discrimination Act 1995 such as was referred to by Stuart-Smith LJ in *Lewisham and Guys Mental Health NHS Trust v Andrews (decd)* [2000] ICR 707, para 20, but the overriding consideration was that an executor was deemed to be the person whom he represented, i e the deceased, and thus the claim being brought by the executor was effectively being brought by the person in question. The 1934 Act was of no relevance, it having been necessary to remove an obstacle existing in the common law of England which did not exist in Scotland, and it was highly significant that the 1934 Act had not been translated into the Scottish jurisdiction, the reason being that it was unnecessary. There was no reason on provision in the statute which precluded an executor from bringing a claim for disability discrimination; and, a fortiori, he was entitled to bring a claim for breach of contract.

Executors of the late Gary Soutar v James Murray & Co (Cupar) Ltd; 7 November 2001; EAT/592/01
EAT(Sc): Lord Johnston, Dr A H Bridge and Mr P M Hunter

WAGES

An employment tribunal found that an essential car user's allowance paid to an employee by his employers fell within the definition of "wages" in section 27(1)(a) of the Employment Rights Act 1996 and was not a "payment in respect of expenses" for the purposes of section 27(2)(b), and that the withdrawal of the allowance was an unauthorised deduction from wages and as such contrary to section 13 of the 1996 Act.

LORD JOHNSTON, allowing an appeal by the employers, said that the allowance had been available on the basis that the person in question had access to a car, and those entitled to the allowance had received a sum of money throughout the calendar year divided into 12 equal installments and also a mileage allowance if the car was actually used for work purposes. One of the issues was whether those two parts of

ne allowance should be treated separately. The important principles to be drawn from *Southwark London Borough Council v O'Brien* [1996] IRLR 420 and *Johnson v Hampshire Probation Service* unreported) 14 September 1999 (EAT/1144/98) were that generally what could be categorised as llowance, and therefore as expenses, did not necessarily have to meet the precise expenditure incurred. The fact that there was a profit element did not, in an appropriate case, remove the relevant payment from he notion of expenses if otherwise the relevant criteria were met. Nor could an allowance be apportioned etween the expense element and the profit element. If there was an expense element that was sufficient to ategorise the allowance in question as expenses. The fact that the car was hardly ever used by the mployee was nothing to the point if he was receiving a payment that reflected to some extent inevitable xpenditure relating to the standing charges that a car owner incurred. In any event, the allowance, both in elation to the user's allowance and the mileage allowance, were two sides of the same coin comprising one llowance with two elements in it, and it was inappropriate to distinguish between the two. The proper onstruction to be put on the allowance was one of "expenses" in terms of section 27(2)(b) of the Employment Rights Act 1996, and, in those circumstances, there had been no unlawful deduction of vages.

Dundee City Council v Robertson; 7 November 2001; EAT/595/01
EAT(Sc): Lord Johnston, Dr A H Bridge and Ms A E Robertson

APPEAL

An employment tribunal chairman made an order on a pre-hearing review, pursuant to rule 7 of th Employment Tribunals Rules of Procedure 1993 (in Schedule 1 to Employment Tribunals (Constitutio and Procedure) Regulations 1993), requiring the applicant to pay a deposit of £150 as a condition of bein permitted to continue with his complaint of disability discrimination.

LINDSAY J, dismissing the applicant's appeal against the order, said that the first issue was whethe appeal was possible in a case such as the present. It was plain, looking at the 1993 Rules, that wha emerged from the employment tribunal in a rule 7 case was an "order". Section 21(1) of the Employmen Tribunals Act 1996 provided that an appeal lay to the appeal tribunal on a question of law arising from "decision" of an employment tribunal, but the word "decision" was given no defined meaning. Reference in the 1996 Act to "decisions", "orders" and "awards" were all made without any clear meaning emergin such as to deny the word "decision" in section 21(1) its full ordinary meaning as one capable of embracin any determination, award or order. So far there was nothing pointing to the unappealability of a judgmen on a rule 7 deposit being required. Nor was there anything about the subject matter of rule 7 whic precluded or suggested the exclusion of appeals on determinations under that rule. It was notable, too, tha nothing in the 1996 Act pointed to how, if at all, determinations which were not "decisions" in som special sense were to be appealed, or provided that they should be incapable of being appealed. However the employment tribunal's order under rule 7, depending on one's definition of "interlocutory", woul seem not to be a "decision" within the particular terms of regulation 2(2) of the Employment Tribunal (Constitution and Procedure) Regulations 1993. That, though, of itself would preclude an appeal to th appeal tribunal if it were only "decisions" within that regulation 2(2) special meaning which wer permitted to be appealed, and there was no such requirement in the Employment Appeal Tribunal Rule 1993. Rule 3(1) of those Rules contemplated an "order" as capable of being the subject matter of a appeal, and, though it was true that rule 3(2) set the time limit for an appeal by reference to the sending ou of the employment tribunal's extended reasons, appealability was not necessarily precluded by the absenc of extended reasons, especially where, as in the case of rule 7 of the Employment Tribunals Rules o Procedure 1993, the employment tribunal's own Rules provided for reasons being given only in summar form. The applicant was, therefore, entitled to appeal to the appeal tribunal, and the reasons given by th employment tribunal sufficed for the purpose of instituting the appeal. On the issue of perversity, it wa plain that a chairman, while aware that his decision was necessarily provisional and could not be based o the fullest evidence and might later be shown to be wrong, could reasonably have arrived at the view tha the applicant's proceedings had no reasonable prospect of success.

Hussain v Addaction; 23 October 2001; EAT/755/00
EAT: Lindsay J, Mrs J M Matthias and Mr R Sanderson

EMPLOYMENT TRIBUNAL

An employment tribunal, on an employee's complaint of unfair dismissal, heard evidence from th employer and decided not to hear any further evidence or submissions on the basis that they had taken th view that the dismissal was unfair, because, although the employer had established an admissible reaso for dismissal, the penalty of dismissal for the misconduct in question, namely the theft of a damaged packe of 10 cigarettes, was outside the range of reasonable responses. Some submissions on the merits were the made by the employer, but the tribunal upheld the complaint.

MR RECORDER UNDERHILL QC, allowing an appeal by the employer, said that it was the view o the appeal tribunal that, on the facts, dismissal of the employee was unquestionably within the range o reasonable options open to the employer, though the value of the cigarettes was extremely small and they were not part of the current stock. It was common sense that an employer who had to leave an employee i sole charge of stock was entitled to take the view that any dishonest taking of goods was very serious Though dismissal would usually be a fair sanction, each case turned on its own circumstances. Th conduct and reasoning of the employment tribunal was open to criticism in other respects. As the appea tribunal made clear in *Hackney London Borough Council v Usher* [1997] ICR 705, 713C–D, it was only i the most exceptional case that it was right for a tribunal in an unfair dismissal claim to reach a decision o the issue of reasonableness, where the burden of proof was neutral, without hearing the evidence of both parties. The present was not such a case. But, in any event, it could never be right for such a decision to b reached without the party going first being given an opportunity to make submissions. Whatever th employer was able to say after the chairman had announced the tribunal's decision, it could not have been fair for the employer to be obliged to make those submissions to a tribunal which had already unequivocally announced its decision. It followed that, even if the appeal tribunal had not upheld th

appeal on the ground of perversity, the case would have had to be remitted to another tribunal for a full rehearing.

Tesco Stores Ltd v Othman-Khalid; 21 November 2001; EAT/385/00
EAT: Mr Recorder Underhill QC, Mr P D Wickens and Mr G H Wright

FIXED TERM CONTRACT

A tutor was employed under successive fixed term contracts from the beginning to the end of the academic year, each containing a clause waiving any right to claim unfair dismissal on termination of the fixed term without renewal. When his contract was not renewed and he complained of unfair dismissal, an employment tribunal held that during summer vacations the applicant had been absent on account of a temporary cessation of work and, including the previous summer vacation, the applicant's last contract had been for one year or more, for the purposes of section 197(1) of the Employment Rights Act 1996, and he was precluded by the waiver clause from bringing a complaint.

WALL J, allowing an appeal by the applicant, said that the waiver clause only applied if the applicant's contract was for a fixed term of one year or more, and each of the applicant's contracts had been for less than one year. There was a material difference in law between the calculation of continuity for the purposes of redundancy and the right to apply under Part X of the 1996 Act in relation to unfair dismissal. As far as continuity was concerned, it was common ground, applying *Ford v Warwickshire County Council* [1983] ICR 273, that the applicant was employed throughout the entire period of his employment. But when one came to the waiver clause it was self-evident that each contract contained the same clause, that each contract was distinct and that the waiver was made in relation to each of the contracts individually. Those waivers could not be accumulated. Each had to be looked at separately. If one did that, it was immediately self-evident that the waiver clauses were invalid, since none of the contracts was for a period in excess of one year. The waiver clauses in the individual contracts could not be added up to obtain a period of employment in excess of 12 months for the purposes of section 197(1). There was no discrepancy between calculating a period of continuous employment by reference to the individual contracts and at the same time looking at each contract to see whether the waiver clause was valid in relation to that contract.

Puncher v Bishop Grossteste College; 6 November 2001; EAT/691/00
EAT: Wall J, Mr S M Springer and Miss S M Wilson

SEX DISCRIMINATION

An employment tribunal dismissed a claim by an employee that her employer's failure to allocate shares to her when she was absent form work on maternity leave amounted to sex discrimination under section 1(1)(a) of the Sex Discrimination Act 1975, either because she was on maternity leave or by comparison with two actual male comparators.

JUDGE PETER CLARK, allowing an appeal by the employee, said that it could be inferred from the employment tribunal's reasons that the employee had established less favourable treatment to the satisfaction of the tribunal, and the question was whether that treatment was on grounds of her sex, i e because she was on maternity leave. The tribunal had been persuaded, perhaps by the way in which credibility had been put at the forefront of the employer's submissions, to see the case in stark terms: if the employer's evidence was accepted, then the employee's case must fail; if rejected, then she succeeded. The tribunal accepted the employer's evidence; therefore, the claim of sex discrimination failed. Such an approach was fatally flawed in law. The case was a good example of the principles in *Anya v University of Oxford* [2001] ICR 847 in practice. Instead of looking to the employer for an explanation for the less favourable treatment of the employee, the tribunal asked whether the employer's case lacked credibility. As *Anya* made clear, it was necessary for the tribunal to consider the surrounding circumstances relied on by the employee in support of her claim. That the tribunal had manifestly failed to do, contenting themselves with deciding the case solely on the credibility of witnesses. The tribunal had referred to the possibility of unconscious discrimination but failed to go on to deal with it on the facts. It was because, as Neill LJ had pointed out in *King v Great Britain-China Centre* [1992] ICR 516, it was unusual to find direct evidence of discrimination that tribunals had to look at all the surrounding circumstances in order to determine whether the employer was motivated by subconscious, not simply conscious, discrimination. The tribunal had failed to do that in the present case. They failed to apply the correct legal test for the drawing of inferences. However, the employee's submission that the tribunal's conclusion was one which no reasonable tribunal, properly directing themselves, could reach could not be accepted. Accordingly, the case would be remitted for rehearing before a fresh tribunal.

Hayes v Charman Underwriting Agencies Ltd; 19 December 2001; EAT/242/00
EAT: Judge Peter Clark, Mr D A C Lambert and Miss S Wilson

UNFAIR DISMISSAL

An employment tribunal dismissed an employee's complaint of unfair dismissal, holding that, although no reasonable employer could have concluded from the facts that the employee had attempted to defraud the employer by falsely claiming sick pay, which was the sole reason relied on by the employer, the employer's true reason was its concern to be seen to be tackling absenteeism and the employer had acted reasonably in dismissing the employee for that reason.

MR COMMISSIONER HOWELL QC, allowing an appeal by the employee, said that the first and only suggestion of there having been some other and distinct reason for the employee's dismissal had come from the tribunal chairman during the employer's evidence. The evidence was concluded without any further specific reference to the chairman's suggestion that the dismissal might have been justifiable for some other reason than the employee's misconduct, and the employee's representative made no submissions on the possibility of such an alternative reason being relied on by the employer. The tribunal erred in law in basing their decision on their own assumption of an alternative and separate reason for dismissal, when the employer had never put it forward as a separate and independent ground divorced from the misconduct allegation and the possibility had only been touched on by a suggestion from the chairman part way through the evidence and never properly introduced as an issue. The relative informality of proceedings before employment tribunals meant that they were not bound by strict and formal rules of pleading, so, although it was always desirable for matters in issue to be defined beyond doubt by amendment, the important question was not a formalistic one. Instead, it was the practical consideration of whether any alternative reason to be relied on in favour of the employer under section 98(1) of the Employment Rights Act 1996, and most importantly any alternative factual basis to establish such a reason, had been raised clearly enough as a question needing to be addressed, so that the applicant had a fair opportunity of addressing the case he had to meet and deploying his own evidence and argument on any issues that raised. (See *Murphy v Epsom College* [1983] ICR 715, 723, and *Hannan v TNT-IPEC (UK) Ltd* [1986] IRLR 165, para 22.) In the present case it could not be said that the alternative reason for dismissal suggested by the chairman was simply another way of labelling the dismissal actually imposed by the employer for misconduct and fraud. It was necessarily independent of the misconduct charge, which the tribunal quite properly held unsustainable, and raised additional issues of fact. Nor could it be said to have been introduced with anything like the clarity to make it into an issue "expressly ventilated" in the proceedings [see *Murphy*]. The factual case it involved under section 98(1) was necessarily inconsistent with the employer's actual reliance on fraudulent misconduct maintained throughout the evidence. The tribunal erred in deciding the case on that ground. The appeal was also allowed on the ground that no reasonable employment tribunal could have held a summary dismissal for such a reason—the desire of the employer to be seen to be tackling the absenteeism problem—to be within the band of reasonable conduct for a reasonable employer on the facts.

Leeson v Makita Manufacturing Europe Ltd; 20 December 2001; EAT/911/00
EAT: Mr Commissioner Howell QC, Mr J Hougham and Mr R Thomson

UNFAIR DISMISSAL

Preliminary issues were directed to be determined, on an employee's complaints of unfair dismissal and sex discrimination, as to whether, inter alia, she could raise health and safety grounds such as would make any dismissal unfair. A chairman hearing the issues decided that the employee, a trainee registrar, was not entitled to complain that she was dismissed for a reason which fell within section 100 of the Employment Rights Act 1996.

LINDSAY J, on appeal by the employee, said that the judgment related to one of three appeals in the proceedings. The employee had been acting in person and the task had plainly become burdensome, with issues as to her health and questions of adjournment being raised. The matter had a long history, and, bearing in mind the need to be just to both parties, the appeal tribunal had moved on to hear the substance of the appeals, in the absence of the employee. The first appeal concerned section 100 of the 1996 Act. The employer's case had been that section 100 was concerned with dismissal for reasons connected with health and safety only where the risk was to employees, including the applicant; that the provision was enacted to comply with Directive 89/391/EEC, the terms of which were expressly limited to workers and did not extend to problems related to patient care, in the way argued by the employee. The employee had argued that section 100(1)(e) could have been, but was not, phrased to refer to other workers or other employees. The tribunal held that section 100 should be interpreted as limited to the ambit of Directive 89/391. It was to be noted, however, that, whereas in paragraphs (a) and (b) of section 100(1) where "health and safety" was mentioned the words "at work" were added, in paragraph (c) they were not, and in paragraph (e) there was just a reference to "other persons", which on the face of things meant exactly what it said. There was no reason, in point of construction, to limit the ambit of paragraphs (c) and (e) to harm or possibilities of harm at the dismissed employee's place of work or to his fellow employees, or to any employees. The reasoning of the employment tribunal could not be supported. Though it seemed extremely unlikely that the employee's case, as so far raised, did fall within section 100, unfortunately, the employment tribunal never seemed to have considered whether it did. It never looked, so far as one could see, at precisely what her complaints were or to examine whether they could or did fall within section 100. A crucial part of the

case was, therefore, left unconsidered by the tribunal. The combination of unsupportable reasoning coupled with that failure amounted to a material error of law. So, provisionally, there was a case for remitting the matter. But whether that would be appropriate turned on other parts of the appeal, to be considered later.

Von Goetz v St George's Healthcare NHS Trust; 18 October 2001; EAT/1395/97
EAT: Lindsay J, Mr P A L Parker and Mr G H Wright

APPEAL

An employment tribunal upheld an applicant employee's claim to be entitled to a full statutory redundancy payment from his employer, a limited company. The company lodged an appeal but was subsequently the subject of an administration order and solicitors acting for the joint administrators indicated to the Employment Appeal Tribunal that there were insufficient funds to continue with the appeal.

JUDGE PETER CLARK, dismissing the appeal, said that the applicant's solicitors had written to the Employment Appeal Tribunal asking the tribunal to dismiss the appeal without the need for them to instruct counsel to oppose it. The solicitors for the administrators had indicated that they were instructed to take no further steps in the appeal. On the appeal Miss McCann of counsel appeared for the applicant. The employer did not appear and was not represented. Paragraph 13 of *Practice Direction (EAT: Procedure)* [1996] ICR 422 was headed "Disposal of appeals by consent". An appeal might be withdrawn by consent without difficulty. An appeal against a reasoned decision of an employment tribunal would not be allowed by consent without the appeal tribunal first determining whether there was good reason for making the agreed order. Nothing, however, was said about the case in which an appellant did not actively pursue an appeal or withdraw it and no agreement was reached between the parties. In such circumstances the appeal ought to be dismissed without an inquiry into the merits for the following reasons. (1) As between the parties, the respondent was seeking to uphold the reasoned decision of the employment tribunal, and, in the absence of argument from the appellant, the appeal tribunal ought not to interfere with it. (2) It often happened that the point in an appeal was of wider interest, and in those circumstances it would be undesirable for the appeal tribunal to reach a conclusion in the absence of argument from the appellant. It was far better that a decision not binding on other employment tribunals but disposing of the lis between the parties should stand without endorsement or qualification by the Employment Appeal Tribunal.

Robert Fletcher (Greenfield) Ltd v Blakeman; 20 November 2001; EAT/767/00
EAT: Judge Peter Clark, Mr B Gibbs and Mr P D Wickens

COMPENSATION

When assessing compensation for unfair dismissal, an employment tribunal made no award for loss of future earnings, holding that, as the employee was in receipt of incapacity benefit, she was unable to work, had no ability to earn, and, therefore, had suffered no loss. The tribunal also made an award of costs for the remedy hearing against the employee on the ground that she had acted unreasonably, within the meaning of rule 12 of the Employment Tribunals Rules of Procedure 2001, in refusing a reasonable offer from the employers to settle her claim, while expressing the view that in the circumstances it was insulting to the employee for the employers to seek costs against her and suggesting that the order should not be enforced.

LINDSAY J (PRESIDENT), dismissing the employee's appeal against the compensation order but setting aside the costs order, said that the employee asserted, inter alia, that the tribunal had wrongly treated her receipt of incapacity benefit as conclusive of her being unable to work. It had been entirely proper for the employment tribunal to look carefully at the employee's application for incapacity benefit and the incapacity for work questionnaire. The tribunal would not have been justified in jumping from the fact that she was in receipt of incapacity benefit to a conclusion that she was on that account unable to work. Regulation 25 of the Social Security (Incapacity for Work) (General) Regulations 1995 showed that the benefit system was concerned with a form of *deemed* incapacity for work which was not necessarily an actual inability to work. The employment tribunal's statement that "she is *therefore* unable to work" provided some fuel for the employee's argument, but it was difficult to accept that an experienced tribunal would believe that merely because of the receipt of incapacity benefit there was, in necessary consequence, an inability to work. In context, "therefore" could be seen as meaning no more than "in all the circumstances we have described". As such it was a legitimate finding of fact and represented no error of law. As to costs, the tribunal had a broad discretion which made it difficult to point to an error of law. The discretion did, however, have to be exercised judicially. An award of costs was properly a two-stage exercise: first, the question was whether the discretion under rule 12 of the Employment Tribunals Rules of Procedure had arisen—that was answered affirmatively—but the second question was whether that discretion should be exercised and if so what award should be made. That question did not seem to have been considered. Further, the tribunal's curious remark about it being insulting for the employers to seek costs and the expression that consideration might be given to not enforcing the costs order could only be explicable as it being the wish of the tribunal to put some pressure on the employers not to seek costs by their taking into account in making the order for costs that it might not be enforced. Both those points represented errors of law and the award of costs would be set aside. It was far from an extreme case of a

rty conducting proceedings unreasonably. An offer of £1500 had been made relatively shortly before the medies hearing and the award was £1007. While not wishing to deter the making and acceptance of nsible offers, if it became the practice that an applicant who received no more than two-thirds of a sum fered in a rejected *Calderbank* offer was then, without more, to be visited with the costs of the remedies aring, such offers would become frequent, yet it was plain that the legislature had never so provided. ne employment tribunals' costs regime was to be distinguished from the costs regime in the High Court d the county court where costs commonly followed the event and a *Calderbank* offer could be given rticular significance.

Monaghan v Close Thornton; 20 February 2002; EAT/3/01
EAT: Lindsay J (President); Mrs M T Prosser and Mr P D Wickens

RACTICE

An assertion by an applicant making an unfair dismissal complaint that she had been employed by the spondent as the "manageress" of a service station since 1993 was directed to be determined as a eliminary issue. The respondent was anxious to obtain a ruling that persons in the position of the plicant were self-employed franchisees and not employees, and the applicant's case was listed with three milar cases. At the end of the first morning of the three days listed for the hearing, after hearing bmissions from counsel for the respondent and from the applicant, the tribunal indicated that the plicants faced the risk of an order for costs if they did not withdraw their claims. The applicant said that ced with the threat of substantial costs she could not go ahead, and the tribunal decision was that the plication was dismissed on withdrawal by the applicant.

MAURICE KAY J, allowing an appeal by the applicant, said that the picture that emerged was of the spondent seeking to persuade the employment tribunal to dismiss the applicant's application in limine, e tribunal declining to accede to that, but on its own initiative saying to the applicant that if she roceeded she might end up with a substantial order for costs against her. The applicant argued that the mployment tribunal had put her under unfair and inappropriate pressure to withdraw. It was accepted at the employment tribunal had acted at all times in good faith, but if the reality was that the applicant's ithdrawal was caused and conditioned by an unfair and oppressive approach the appeal tribunal was ntitled to relieve her from the consequences of that unfairness and oppression. In the judgment of the ppeal tribunal, the employment tribunal was wrong to issue the costs warning in the forms it did in rcumstances in which it had decided not to accede to the respondent's application for summary disposal. Moreover, that had all occurred in a jurisdiction in which unsuccessful litigants were only exceptionally bjected to costs orders and in which the statutory mechanism for discouraging applicants who had a case hich was considered at an early stage to have no reasonable prospect of success was the requirement of a odest deposit. Regrettably, the approach of the tribunal had been unfair and oppressive and had left the pplicant no other alternative but to withdraw. The appeal tribunal had been referred to statutory rovisions and authorities which, the respondent submitted, would enable the tribunal to allow the appeal nd substitute an order dismissing the applicant's application, should the tribunal take the view that her ase would have been bound to fail in any event. What that jurisprudence failed to disclose was any case in hich the appeal tribunal had substituted its own decision dismissing an application where there had never een a full substantive hearing. It would not be right to dismiss the applicant's application in the rcumstances. No evidence had been heard and the appeal tribunal had not had the benefit of full rgument on the documents. The case would be remitted to a different tribunal, initially for directions.

Gee v Shell UK Ltd; 14 January 2002; EAT/484/00
EAT: Maurice Kay J, Mr J Crosby and Mrs T Marsland

RACTICE

An employee went home from her employment as a cleaner at Heathrow Airport because she was told at she could not continue to work there as she had no security pass. The employee did not return to work elieving that she required a pass. On a complaint of unfair dismissal by the employee, the employers ontended that they had explained to the employee that she did not require a pass and that she was absent om work without authority. The employment tribunal found that, having regard to the fact that the mployee could not speak English at all well and had to rely on an interpreter, the employers had failed to xplain what the position was and the employee had been unfairly dismissed. An application for a review as made by the employers on the ground that a fair hearing had not taken place since they had not been otified that an interpreter was to be used and that the interpreter was in fact the employee's daughter-in-w. The application was rejected.

JUDGE PUGSLEY, dismissing an appeal by the employers, said that the employers contended that it as wrong for the daughter-in-law to act as an interpreter but their real grievance was that they had had no rior knowledge that an interpreter would be used. That was a fair point, but it was not appropriate to lay own guidelines of a far reaching nature as the case could be confined to its own facts. It seemed that the terpreter had been asked two questions by the tribunal chairman along the lines of: "Did the employee

feel she couldn't return to the job because of the identification pass?"—answer "Yes"—and "Did she enjo the job?"—answer "Yes, even when she was ill". There was nothing in the decision that one could point as a major finding of fact relating to that evidence, and, in the context of the case, there was no injustice the way that occurred. There were always going to be difficulties with interpreters, but tribunals would b able to form a view on the reliability of someone's evidence, albeit that it was given through an interprete Though there was no legal duty, it was good practice for notice to be given where an interpreter was to b used. Further, it might be appropriate either at the directions hearing or earlier for people who were goir to use an interpreter to give an indication, so that the issue was flagged up for the other side. On the fact however, having regard to how evidence from the interpreter emerged, there had been no breach of natur justice.

OCS Cleaning South Ltd v Dhillon; 22 November 2001; EAT/778/00
EAT: Judge Pugsley, Mrs D M Palmer and Mr P M Smith

PRACTICE

At the conclusion of an applicant's evidence an employment tribunal concluded that he had no established that he had been less favourably treated than a comparator and dismissed his complaint of se discrimination. The tribunal took the view that the applicant had acted frivolously and unreasonably i pursuing his complaint because it had no reasonable prospect of success and they ordered him to pay £10 by way of costs.

MR RECORDER LANGSTAFF QC, dismissing an appeal by the applicant against the dismissal of h complaint and allowing an appeal against the order for costs, said that the appeal tribunal wished t emphasise, yet again, that a tribunal should exercise its power to accept a submission of no case to answe only in exceptional and rare cases. However, the appeal tribunal had been persuaded that the employmer tribunal had been entitled to take the view that it was such an exceptional case. That was because the cas that the applicant was advancing had to begin with the proposition that he was comparing like with like Discrimination existed where someone in like circumstances to another was treated in an unlike manner o where people in unlike circumstances were treated in a like manner. What was in the tribunal's mind wa the applicant's inability, having given his evidence and been questioned, to show to their satisfaction tha his circumstances were materially similar to those of his chosen comparator. The power to award costs under rule 12 of the Employment Tribunals Rules of Procedure 1993, should be exercised with restrain because it involved, or might indicate, that the individual against whom the order was made had acted in bad faith. There was an obvious inconsistency between the decision of an employment tribunal chairma at a preliminary hearing to reject an application by the employer to strike out the applicant's claim a having no reasonable prospect of success and the decision to the opposite effect by the tribunal which hear the case. That inconsistency required some explanation. The costs decision was either one reache without regard to the earlier tribunal hearing or it was one which did not sufficiently explain its reasoning such that it could not stand.

Stubbings v Ministry of Defence; 1 February 2002; EAT/1420/99
EAT: Mr Recorder Langstaff QC, Mr B V Fitzgerald and Mr S M Springer

UNFAIR DISMISSAL

An employment tribunal rejected a claim by an employee, who was a chargehand and health and safety adviser, that he had been unfairly dismissed under section 100(1)(a) of the Employment Rights Act 1996 in that he had been selected for redundancy because of his health and safety activities; but the tribuna found that the employee's dismissal was unfair under section 98(4) in that the employer, when carrying ou its redundancy exercise, had assessed the employee simply as a chargehand and failed to give credit for his work as an adviser.

WALL J, allowing an appeal by the employer and dismissing the complaint, said that the employment tribunal's decision had focused substantively on *Smiths Industries Aerospace & Defence Systems v Rawlings* [1996] IRLR 656, where the applicant was an elected health and safety representative. The majority of the tribunal took the view that in so far as dismissal under section 98(4) was concerned that case was not binding on them. They accepted the applicant's argument that it was a case on its particular facts and related specifically to a trade union health and safety representative, who claimed the protection of section 100(1)(b), and did not apply to an adviser, who was protected by section 100(1)(a). There was however, no reason in principle to distinguish between the protection afforded to persons who came within paragraph (a) of section 100(1) [advisers] and those who came within paragraph (b) [representatives]. The appeal tribunal agreed with the conclusions in *Smiths Industries*. Its conclusion that "the protection against dismissal in a redundancy exercise afforded to health and safety representatives is neutral" applied equally to employees who were advisers within section 100(1)(a). Like those within section 100(1)(b) they must not be disadvantaged by negative discrimination, and equally they were not entitled to be advantaged over their fellow employees in the redundancy selection pool. The employment tribunal's decision in the present case that there should have been positive discrimination was an error of law. The tribunal regarded

hat it perceived as the failure to exercise positive discrimination as effectively determinative of the nfairness" issue under section 98(4). It did not address the statutory criteria within section 98(4)(a) and ndoubtedly substituted its own view of what was fair and unfair rather than considering the question of hether the dismissal lay within the range of conduct which a reasonable employer could have adopted.

Shipham & Co Ltd v Skinner; 13 December 2001; EAT/840/00
EAT: Wall J, Mr J R Crosby and Mr S M Springer

CONTINUOUS EMPLOYMENT

An employee, whose employment had commenced in 1973, did not return to work after maternity leave in 1990, and, pursuant to her employer's "child break scheme", resigned, while remaining in contact with the employer and working at least two weeks each year, with the promise of re-employment in a managerial position on her return. The employee recommenced full-time employment in 1994. In 19[illegible] she was made redundant and paid a redundancy payment calculated on the basis that her continuity of employment had been broken by her absence under the scheme. An employment tribunal dismissed her claim for an unlawful deduction of wages.

JUDGE WILKIE QC, allowing an appeal by the employee, said that the employment tribunal had been right to reject the employee's first argument that throughout the period of the child break scheme her relations with her employer were governed by a contract of employment, because there had been a absence of mutuality of obligation in respect of the provision and performing of work, which was the necessary precondition for a contract of employment. The employee then argued that the scheme was an arrangement by which she was "regarded as continuing in the employment of her employer for any purpose" and so fell within section 212(3)(c) of the Employment Rights Act 1996. That provision provided that a week not governed by a contract of employment during which an employee was "absent from work in circumstances such that by arrangement or custom he is to be regarded as continuing in the employment of his employer for any purpose" counted in computing an employee's period of employment. The majority of the appeal tribunal had concluded that the child break scheme did, as a matter of law, amount to an arrangement which fell within section 212(3)(c). The starting point was that section 212(3)(c) only bit where there was no contract of employment in existence. Thus, the fact that the employee had been required to, and had, resigned and suffered all the incidents of the cessation of her contract of employment was not determinative. One had to look at the terms of the agreement as the primary source of evidence as to what the parties regarded as the position during the period when it was envisaged there would be no contract of employment in existence. It was clear, in the view of the majority, that the parties envisaged that there would be some relationship between them during that period. The employee was to keep her hand in by working at least two weeks a year. She was not to seek alternative employment without consulting the employer. She was to have a line or personnel manager allotted to her. That set of arrangements clearly had a purpose, namely, to facilitate the smooth re-engagement of the employee in to a management role at the conclusion of the break. Those manifestations of continuing obligations and contacts could only sensibly be described as continuing the employment relationship.

Curr v Marks & Spencer plc; 6 March 2002; EAT/1284/00
EAT: Judge Wilkie QC, Mr D A C Lambert and Mr K M Young

DISCIPLINARY PROCEEDINGS

An employee was disciplined for circulating a letter containing his grievances about his employers' staff and practices. A memo from the employers to the disciplinary panel stated that it was the employers' view that the employee's action constituted gross misconduct. The applicant was dismissed and made a complaint of unfair dismissal on the ground that he had not had a fair hearing. The employment tribunal dismissed the complaint.

JUDGE PUGSLEY, allowing an appeal by the employee, said that at the preliminary hearing of the appeal it had been submitted that the memo was bound to prejudice the minds of the employees conducting the disciplinary hearing and that the likelihood of the employee getting a fair hearing was very uncertain. The appeal tribunal was uncomfortable with equating the question of judicial bias with the conduct of a disciplinary hearing. There would be many cases involving small employers when it would be wholly unrealistic to expect that the person making the decision to dismiss would be unaware of many of the details of the case and would not have close relations with, and knowledge of, the person involved. The tribunal should be guided by *Bentley Engineering Co Ltd v Mistry* [1979] ICR 47, where Slynn J had quoted with approval the words of Harman J in *Byrne v Kinematograph Renters Society Ltd* [1958] 1 WLR 762, 784: ". . . the person accused should know the nature of the accusation made . . . he should be given an opportunity to state his case; and . . . the tribunal should act in good faith . . ." Slynn J had refined that by saying that natural justice required not merely that a man should have a chance to state his own case in detail but he must know in one way or another sufficiently what was said against him. In the context of disciplinary proceedings in employment it would be quite wrong to lay down formalistic rules that would disqualify a range of persons from taking any part in the decision to dismiss or uphold that decision on an appeal hearing. The procedure to be adopted and the persons appropriate to make the decision to dismiss and hear any appeal against that decision would vary with the nature of the undertaking and the complexity of the issues involved. The sense of fairness of an employment tribunal, including as it did members with experience of both sides of industry, was a sufficient bulwark against unfairness in the

rkplace. The appeal tribunal was, however, concerned at the failure of the employment tribunal to deal h the notes of guidance given to the disciplinary panel in the employers' memo. The letter circulated by employee was redolent of the reaction of someone who felt a sense of injustice without having the histication to express that injustice in appropriate and suitably emollient terms. The tribunal's reasons ked any recognition that, having taken careful steps to ensure that the panel should be free from bias, the mo then appeared to pre-empt the most crucial decision, namely, whether circulation of the letter was act of gross misconduct. It was not that the memo inevitably tarnished the decision to dismiss, so that such dismissal must be unfair, but that, given the factual background, the memo raised serious issues ich demanded the tribunal's scrutiny and appropriate findings. That was an issue that went to the very rt of the decision of fairness. The only way to deal with the matter was to direct a rehearing before ther tribunal.

Caredda v London Goodenough Trust for Overseas Graduates; 16 January 2002; EAT/843/00
EAT: Judge Pugsley, Mr K Edmondson and Mrs R A Vickers

OLIDAY PAY

An employment tribunal awarded an employee £277 in respect of arrears of accrued holiday pay itlement, based on a calculation of the daily rate of pay arrived at by taking as the relevant number of s the 233 working days in a year.

JUDGE WILKIE QC, dismissing an appeal by the employer on the preliminary hearing, said that the ployer argued that the appropriate number of days in a year for the calculation of the daily amount of was 365 days. In *Thames Water Utilities v Reynolds* [1996] IRLR 186 the Employment Appeal bunal concluded that "day-to-day" in section 2 of the Apportionment Act 1870 meant calendar days l not working days. On the face of it, therefore, it might be thought that the present appeal had an uable prospect of success. It was, however, the strong view of the lay majority of the appeal tribunal t such an approach was at odds with the virtually universal practice in industry in respect of the culation of pay in respect of accrued holiday entitlement, which was by reference to a day's work rather n calendar days per year. Furthermore, the *Thames Water* case predated the Working Time Regulations 98, which provided the paradigm for provisions in respect of periods of leave. Reference was made in agraph 16 of the Regulations to sections 221 to 224 of the Employment Rights Act 1996 which were cerned, among other things, with the calculation of a week's pay, and it was noticeable that all of those visions took as their working assumption the hours actually required to be worked, not the number of rs in a 24-hour day or a seven-day week. Accordingly, it seemed that in the particular context the cept of day-to-day accrual for the purposes of calculating payment for accrued holiday entitlement st be by reference to the number of working days in the year and not the number of calendar days in the r.

Leisure Leagues UK Ltd v Maconnachie; 14 March 2002; EAT/940/01
EAT: Judge Wilkie QC, Ms J Drake and Mr R N Straker
Reporter's note. See also *Taylor v Lowe*, 20 July 2000, EAT/128/99; Recent Points [2000] ICR Part 8.

ACTICE

An employment tribunal dismissed an employee's complaint of unfair dismissal, pursuant to rule 9(3) he Employment Tribunals Rules of Procedure 1993, when neither the applicant nor his solicitor had peared nearly an hour after the hearing was due to commence. The solicitor had phoned the tribunal t morning to say that he was unwell and unable to attend and that he would send a fax later, but no fax l been received. The applicant himself later explained that he had mistakenly attended at the ployment Appeal Tribunal and when he arrived at the employment tribunal his case had been struck .

JUDGE PUGSLEY, allowing an appeal by the applicant, said that it would have been sensible for the licant's solicitor to seek a review of the tribunal's decision and to give his explanation for the non pearance of himself and his client at the first opportunity. The failure of litigants to appear at the time l place required was a justifiable source of judicial irritation, but the appeal tribunal was concerned that employment tribunal had acted in a peremptory manner in dismissing the case when they had had ice that the applicant's representative was unwell. The tribunal could have adopted the simple and sible expedient of adjourning the case for the applicant to show cause why it should not be struck out want of prosecution. If a solicitor, or any responsible person, informed a tribunal that they were apacitated through illness, that explanation should not be rejected without clear and cogent reasons. It s not a proper exercise of the judicial discretion to strike out a case for non appearance when the citor had telephoned to say that he was not fit to attend; and the failure of the applicant's solicitor to firm that by fax had to be seen in the context of the options available to someone who was apacitated. The case would be remitted for the employment tribunal to review its decision to strike out.

Adebayo-Orebote v Sureway Parking Services Ltd; 7 December 2001; EAT/1242/00
EAT: Judge Pugsley, Lord Davies of Coity and Mr B M Warman

RELEVANT EMPLOYEE

When an employer sought to implement a new shift system its warehouse operatives went on strike. A the operatives were subsequently dismissed, apart from W who had not worked for five months because ill-health. Complaints of unfair dismissal by the operatives were dismissed by an employment tribunal the ground that they were taking part in a strike and had failed to show, for the purposes of section 238 of the Trade Union and Labour Relations (Consolidation) Act 1992, that one or more relevant employe had not been dismissed.

HOLLAND J, dismissing an appeal by the applicant operatives, said that the applicants had submitt that W, who had not been dismissed, was a "relevant" employee, since, although he had not been physica present at work at the time, he had voted for strike action in the union ballot and should be taken to ha been "taking part in the action" within the meaning of section 238(3)(b). It was said that the employme tribunal had misdirected itself: the issue was not whether W was "on strike" but whether he was taki part in a strike or other industrial action, which activity was less specific. Criticisms of the reasons we justified. Granted that economy of expression was a virtue, the terse directions as to law were arguab inapposite at worst, opaque at best, and the findings of fact, hopefully, did not do justice to the review of the circumstances. But, that said, there was a decision on the facts and, given the patent absence "exceptional circumstances" as identified in *Hindle Gears Ltd v McGinty* [1985] ICR 111, 118D, not or was there no basis on which it could be attacked as perverse, it was arguably the only one open to t tribunal when all the circumstances were taken into account. The lay members of the appeal tribur wished to emphasise that a section 238 issue was rarely easy and called for careful factual analysis whi should be apparent from the reasons. The appeal tribunal were satisfied, however, that, in the particul circumstances of the case, any misdirection as to law did not impugn the findings of fact.

Pointon v BBA Friction Ltd; 12 April 2002; EAT/1380/00
EAT: Holland J, Mr P R A Jacques and Mr J Rivers

WAGES

An employment tribunal chairman dismissed claims by employees, under section 23 of t Employment Rights Act 1996, to be paid travelling expenses between home and work for attendan outside their normal working hours, on the ground that such expenses were incurred "in carrying o [their] employment" within the meaning of section 27(2)(b) of the Act and as such excluded from t definition of wages in section 27.

MAURICE KAY J, dismissing an appeal by the employees, said that the employment tribunal chairm had been referred to *Barrie v Rochdale Metropolitan Borough Council* (unreported) 5 May 1995 a *Southwark London Borough Council v O'Brien* [1996] IRLR 420. There was a passage in *Barrie* th seemed to come very close indeed to the circumstances of the present case, and though the employees h sought to distinguish that case on the basis that there the principal argument was as to whether there wa profit element in the expenses, that was not an important point of distinction. *Barrie* had been cited wi approval by Mummery J, in giving judgment in *O'Brien's* case, where he said, at p 423: "We agree . . . th in a case such as this a finding has to be made that the deduction was either wholly in respect of wages wholly in respect of expenses. What it is in each case is a matter of fact and degree." The appeal tribur had not found the present case to be simple, not least because in section 27(1) and (2) two different forms expression were used, namely, "in connection with his employment" and "in carrying out h employment". But, having regard to all the circumstances, and in particular that *Barrie* had remain uncriticised for more than five years, notwithstanding any difficulties in interpretation, *Barrie* ought to followed and the conclusion of the tribunal chairman upheld. Section 27(2)(b) embraced the assumed fac of the present case involving the common feature of travel between home and workplace. In the last reso it mattered not whether that was correctly described as a matter of jurisdiction; the question was wheth the facts fitted the section. There was another matter worthy of note. In *O'Brien's* case Mummery expressed the view that it was preferable for cases under Part II of the 1996 Act to be heard by a chairma sitting with lay members, rather than alone. In the present case, ultimately the chairman had only be called on to decide a narrow point of construction on assumed facts, but that might not have been his on task. It did nothing to invalidate his decision and the parties had agreed to that course, but the me agreement of the parties was something which Mummery J had suggested ought not to be conclusive as the constitution of the tribunal; and the present appeal tribunal would associate themselves with h comments.

Wildgoose v Rampton Hospital Authority; 17 December 2001; EAT/977/00
EAT: Maurice Kay J, Miss A Mackie and Mr P R A Jacques

PPEAL

An applicant applied for an order striking out the respondents' notice of appearance on the ground of eir scandalous behaviour in conducting the proceedings in that an application by the respondents for an djournment of the hearing, which had been granted by the employment tribunal, had been made in bad ith. The employment tribunal found that there had been no deliberate intention to deceive or mislead the bunal and dismissed the application to strike out.

JUDGE WILKIE QC, dismissing an appeal by the applicant, said that notes of evidence given by the spondents' solicitors, if accurate, raised the gravest doubts about the veracity of an explanation given to e employment tribunal by the solicitors in correspondence with the employment tribunal, and, having lled in to question the reliability and veracity of the sources of evidence on a crucial issue, plainly the true sis of the respondents' earlier letter of application for an adjournment was called in to question. If the imit of the appeal tribunal had enabled it to interfere with findings of fact or to consider whether the nployment tribunal had misunderstood or misapplied the facts, then the appeal tribunal might well have en persuaded that the employment tribunal's decision should not stand. However, the powers of the peal tribunal were severely constrained; it could only uphold an appeal on a point of law, and what nounted to a point of law was equally well established. In *British Telecommunications plc v Sheridan* 990] IRLR 27 the Court of Appeal had identified the bases on which the appeal tribunal could interfere ith the decision of an employment tribunal. It could do so if it was satisfied that the tribunal had isdirected itself as to applicable law, or if there was no evidence to support a particular finding of fact, or the decision was perverse in the sense explained by May LJ in *Neale v Hereford and Worcester County ouncil* [1986] ICR 471. But misunderstanding or misapplication of the facts was not a separate category which the appeal tribunal could allow an appeal if it took a different view of the facts from the nployment tribunal. To the extent that any earlier authorities identified that as a separate basis for llowing an appeal, they should not be followed. There was no question of the tribunal in the present case aving misdirected itself as to the law, there was ample evidence to support its conclusions of fact and, aving regard to the totality of the evidence, the appeal tribunal could not say "My goodness, they have got at wrong." What there was was a body of evidence, both written and oral, which pointed in a certain rection and there was, equally, a passage of evidence, fairly short, but to the point, which appeared to oint in the opposite direction.

Lewin v North East London Probation Service; 1 March 2002; EAT/1123/01
EAT: Judge Wilkie QC, Mr D A C Lambert and Miss A Mackie

OMPENSATION

An employment tribunal assessed compensation for race discrimination on the basis that, on the alance of probabilities, the applicant employee would have returned to work for the employers had the nployers approached matters differently, and it compensated her for the totality of her loss of earnings om the termination of her employment until a date, beyond the remedies hearing, by which time she ould have been able to find other work.

JUDGE WILKIE QC, allowing an appeal by the employers, said that the employers argued that the ibunal had made a fundamental error of approach: it was not concerned with making a finding of fact as what had already happened but with carrying out an assessment of what might have happened had the nployers acted in an appropriate way. It was said that that normally would involve a percentage sessment, which in an appropriate case might be 100%. The tribunal had expressed itself clearly. It had ade a finding of fact on the balance of probabilities. But it was equally clear that where one was assessing e chance of something happening in the future that was not the appropriate approach and some different pproach, demonstrating that the process was one of assessing a chance, was necessary. The case would be mitted to a different tribunal on the question of remedy.

Ministry of Defence v Moitra; 12 February 2002; EAT/1512/00
EAT: Judge Wilkie QC, Dr D Grieves and Mr R Sanderson

OMPENSATORY AWARD

Following a decision that an applicant employee had been unfairly dismissed, an employment tribunal und that the employee had been out of work for four weeks and calculated the basic and compensatory wards by taking the employee's gross weekly pay as £120 for a 63·5 hour week and making an allowance respect of the compensatory award of £50 per week for loss of free accommodation.

JUDGE PETER CLARK, allowing an appeal by the employee against the calculation of the awards and mitting that matter to a different tribunal, said that where it was contended that an employee was paid

less than the national minimum wage that was a matter which had to be investigated by the employme tribunal when assessing both the basic and compensatory awards for determining the proper level compensation recoverable for unfair dismissal. It was no answer that the employee had made no clai under the minimum wage legalisation per se. The inquiry should be added to the list of issues proper arising for consideration by the tribunal set out in *Langston v Cranfield University* [1998] IRLR 172. I section 17 of the National Minimum Wage Act 1998 a worker who was paid less than the statuto minimum had to be taken as entitled to be paid under his contract the difference between what he was pa and the amount of his entitlement under the Act. Section 49(1) prohibited contracting out of the statuto right to be paid the minimum wage. It followed that the calculation of a week's pay for the purposes section 221(2) of the Employment Rights Act 1996 was subject to the statutory minimum wage. In so f as the employee's actual gross wage fell below the statutory minimum the higher figure had to be used calculating a week's pay. Having calculated the employee's gross weekly pay in accordance with th national minimum wage, that sum had to be reduced by the notional tax and National Insuran deductions to provide the net wage. There had been no investigation by the employment tribunal as to th minimum wage to which the employee was entitled. A further complication was the free accommodatic provided by the employer. Whereas the provision of free accommodation did not go to reduce th statutory minimum wage for the purpose of calculating a week's pay in the context of a basic award, assessing the compensatory award there would be an element of double recovery if no account was take of the notional value of the accommodation in the net weekly wage based on the national minimum wag Applying the just and equitable principle in section 123(1) of the 1996 Act, the matter should b approached by calculating the gross pay by reference to the actual hours worked multiplied by th statutory minimum wage, deducting the maximum weekly allowance for accommodation (£19·9 provided for in regulation 36 of the National Minimum Wage Regulations 1999, and netting down th result to allow for tax and National Insurance contributions to give the multiplier for the purpose calculating the loss of earnings over the four-week period. In addition the employee was entitled to th actual value to him of the loss of accommodation, assessed by the tribunal at £50 per week.

Paggetti v Cobb; 22 March 2002; EAT/136/01
EAT: Judge Peter Clark, Ms J Drake and Mr K M Young

HOLIDAY PAY

Under his contract of employment, an employee's remuneration comprised his basic salary plu commission in relation to contracts sold to clients in respect of which 25% of the fee had been paid, and h was entitled to holiday pay at his normal basic rate. An employment tribunal rejected a claim by th employee that, by failing to include commission payable in the calculation of a week's pay for the purpose of regulation 16 of the Working Time Regulations 1998, the employers had made an unauthorise deduction from his wages.

JUDGE WILKIE QC, allowing an appeal by the employee, said that, applying section 221(1)(2)(3) c the Employment Rights Act 1996, the employee's employment was one where there was a normal numbe of working hours and the amount of work done in the period of normal working hours did not vary, in th sense that payment was not based on the amount of work done, rather that payment of commission wa based on the outcome of that work. Therefore, one would have thought that, on the natural meaning c those subsections, commission would not be included as part of payment and the averaging out provisior of subsection (3) would not apply. However, section 221(4), which provided that references t remuneration varying with the amount of work done included remuneration which might includ commission, had the effect of overriding the normal meaning of subsection (3) so that an employee, wh received payment by way of commission which was not payment by reference to the amount of work don but payment by reference to the varying result of work done, was provided for by subsection (3) rathe than subsection (2). It followed that, in rejecting the employee's argument that he was entitled to holida pay calculated by reference to the previous 12 weeks' actual earnings of normal basic pay plus commissior the tribunal had erred in law. In respect of accrued holiday pay entitlement he was entitled to have tha payment calculated by reference to the statutory formulation in section 221(3).

Evans v The Malley Organisation Ltd (t/a First Business Support); 19 February 2002 EAT/99/01
EAT: Judge Wilkie QC, Mr B Gibbs and Ms H Pitcher

PRACTICE

On an employee's complaint, inter alia, that his employer had failed to make to him payments under si heads, the employment tribunal's reasons stated that the employer accepted the applicant's claims for fou of the heads of claim and that the parties had asked the tribunal not to consider them, and the tribuna ruled only on the two remaining heads.

MR RECORDER BURKE QC, allowing an appeal by the employee, said that the employer ha decided not to appear at the appeal hearing. At no point was it suggested in either the tribunal's reasons o

the chairman's notes that the four individual contract claims were to be withdrawn and the tribunal decision itself did not say anything about them. If there had been an agreement between the parties as to those four heads of claim, the tribunal could have either given effect to it by deciding that the heads of claim were withdrawn on agreement or by awarding by consent the sums agreed. If there was no agreement, merely a concession by the employer, the tribunal would have been expected to have made an order in favour of the applicant for the sums conceded. The tribunal did not take any of those courses, and thereby erred in law, because it was bound to make a decision in one form or another, though the tribunal was not wholly to blame, since the parties, through their representatives, ought to have made clear to the tribunal what order they were seeking. Since it was not certain what precisely had happened between the parties, there was no sensible alternative to the matter being remitted to the employment tribunal so that it could resolve between the parties what orders should be made. Counsel for the employee had put the case on an alternative basis. She submitted that in a letter from the employee's solicitors to the tribunal a request had been made for a review of their decision, at which review matters could have been put right. The tribunal had written that the parties had asked them not to consider the four heads of claim and they could not incorporate in to their decision matters which the parties had asked them not to consider. Counsel said that was a refusal of an application for a review. The solicitors' letter, however, did not amount to an application for a review. It was in fact a request to the tribunal to insert in to the original decision an award of amounts in relation to the four heads of claim which had not been dealt with at the hearing.

Gooden v Ritz Country 1035 Ltd; 31 January 2002; EAT/1469/00
EAT: Mr Recorder Burke QC, Miss C Holroyd and Mr R Thomson

REVIEW

An applicant reached an agreement through Acas with the respondent to his claim of wrongful dismissal. Though Acas asserted that they had informed the employment tribunal of the agreement and that, accordingly, there was no need for a hearing, the tribunal denied that they had been so informed, and on the day fixed, when neither party attended, the chairman dismissed the applicant's claim. The chairman refused an application by the applicant for a review on the ground that it had no reasonable prospect of success, commenting that, as the applicant had no doubt received the payment agreed, the interests of justice did not require a review.

MR RECORDER BURKE QC, allowing an appeal by the applicant, said that the respondent had written to say that it did not oppose the appeal. The chairman's failure to allow a review was an error of law. It was not a decision which, on the facts, could reasonably have been reached. There was a real difference between a decision on the register dismissing the claim on the basis that it had failed and a decision that the claim had been withdrawn, the parties having reached an agreement. The difference was not trivial and the applicant was entitled to have the decision expressed in terms that reflected what had really happened and not what the chairman had originally thought had happened, though through no fault of his own he had not been informed of the true situation. No one would have been prejudiced by the replacement of the order with an order in the terms suggested. It was possible that the chairman could have simply corrected the error under the slip rule: rule 10(9) of the Employment Tribunals Rules of Procedure 1993. That seemed the easiest and most sensible course for the appeal tribunal to take and it would, therefore, be directed that the register be amended so as to substitute for the decision that the application failed and was dismissed an order that it was dismissed on withdrawal by agreement of the parties.

Davoren v London Fire Protection Services; 31 January 2002; EAT/1433/00
EAT: Mr Recorder Burke QC, Miss C Holroyd and Mr T C Thomas

WAGES

An employee had taken 15 days of her 20-day annual leave entitlement when she left her employment after six months of the leave year. An employment tribunal chairman upheld her claim for unpaid wages but deducted five days' overpaid holiday pay.

JUDGE PETER CLARK, allowing an appeal by the employee, said that, where a worker's employment terminated during the course of a leave year and at the date of termination she had taken more leave proportionately than she was entitled to in that year, the position was governed by regulation 14(4) of the Working Time Regulations 1998, which provided that a relevant agreement might provide that in such circumstances the worker should compensate the employer. It was common ground that no relevant agreement had been entered into by the parties in the present case. The position was that the employee was entitled to and had received wages for the 15 days' holiday taken during her employment. Credit for the five extra days' holiday pay would only arise where there was express provision in a relevant agreement. In those circumstances an exception was made under section 13(1) of the Employment Rights Act 1996; the deduction of excess holiday pay from the final wage entitlement being authorised by the employment contract or previously agreed or consented to in writing. Section 14(1) of the 1996 Act was immaterial,

whether or not there was a relevant agreement, as there was no "overpayment" of holiday pay. The employee was entitled to paid holiday, up to 20 days per year, under regulation 16(1).

Hill v Chapell; 20 March 2002; EAT/1250/01
EAT: Judge Peter Clark, Mr J Hougham and Mr P R A Jacques

DISABILITY COMPENSATION

An employee, who had been dismissed in breach of the employers' procedures in April 1999 after being off work for a number of months suffering from irritable bowel syndrome developed as a result of being bullied at work, was reinstated and transferred to work which, though physically appropriate, did not address the underlying psychological problem. In November 1999 he was dismissed on grounds of ill-health capability. An employment tribunal upheld the employee's complaint of disability discrimination under section 5(1) of the Disability Discrimination Act 1995, finding that, since the employers had made no attempt to determine what adjustments might be made to enable the employee to work for them, they could not raise a defence of justification under section 5(1)(b). The tribunal awarded £2000 for injury to feelings but nothing for loss of earnings following the second dismissal on the ground that by November 1999 the employee had formed a view that the employers were not to be trusted and, accordingly, he would not have taken up any other job with them.

JUDGE PETER CLARK, allowing an appeal by the employee against the amount of the award, said that, in declining to make any award for lost earnings consequent on the unlawfully discriminatory dismissal and in limiting the award for injury to feelings to the final act of dismissal, the tribunal had failed to apply the tortious principles referred to in section 8(3) of the 1995 Act. It was clear that the employee had lost confidence as a result of what might properly be described as the discriminatory treatment culminating in his dismissal. Though there had been no complaint under section 5(2) of the Act, that did not render any failure by the employers to make reasonable adjustments immaterial to the complaint under section 5(1). The employee's eventual loss of confidence was related to, not independent of, the discrimination under section 5(1), itself rendered unlawful in part by the failure to make reasonable adjustments by virtue of section 5(5). It was thus material to the assessment of loss flowing from the statutory tort. The correct approach to the question of loss under section 8(3) was to ask what were the chances, if the employer had complied with his statutory duty under the Act, that the employee would have retained his employment. In the present case, that depended on a combination of a finding as to the proper adjustment to be made and a finding on medical evidence as to whether the employee would have recovered sufficiently to take up an alternative post. Further, the employment tribunal had artificially restricted compensation for injury to feelings to the single act of the second dismissal. It was for the tribunal to assess the effect of the employers' actions related to their treatment of the employee's disability which culminated in the unlawful act, i e the final dismissal.

Wight v East Riding of Yorkshire Council; 18 April 2002; EAT/101/01
EAT: Judge Peter Clark, Mr J R Crosby and Mr P R A Jacques

EFFECTIVE DATE OF TERMINATION

An employment tribunal held that, where an employee had presented an originating application complaining of unfair dismissal before the employers were aware that he had resigned from his employment, the effective date of termination of his employment was the date the application was presented to the tribunal, and ruled that the application had been duly presented before the end of the period of three months beginning with the effective date of termination as required by section 111(2) of the Employment Rights Act 1996.

LORD JOHNSTON, allowing an appeal by the employers, said that the employers submitted that, for there to be an effective date of termination of a contract by resignation, the resignation had to be intimated to the employer by the employee, at least to the extent that the employer would thus become aware of the employee's position. It was said, therefore, that the earliest date to be regarded as the effective date of termination would be four days after the presentation of the originating application when the employers received a letter of resignation from the employee; and that the application had been presented before the three-month period began. Given the decision in *Edwards v Surrey Police* (Recent Points [1999] ICR Part 4), the employment tribunal's decision that the effective date of termination was the date when the application was presented was plainly wrong because no intimation of the resignation had been given to the employers at that time. It followed that the effective date of termination was the date of the employee's letter. The issue then was whether the time period specified in section 111(2) was a closed period beginning with the date of termination or whether all that mattered was that the application was presented at some stage before the expiry of three months from the date of termination which could be any time before that date. It was plainly Parliament's intention only to open jurisdiction once there had been an effective date of termination. To hold otherwise would admit an open-ended period as far as the beginning was concerned and that flew in the face of the language of the subsection. To be competent an application claiming unfair dismissal had to be lodged with the tribunal within the period of three months beginning with the effective

date of termination. In the present case that had not been done since it had been lodged before the effective date of termination and the tribunal had no jurisdiction to hear the complaint.

Stagecoach in Fife v Higgins; 28 February 2002; EAT/1127/01
EAT(Sc): Lord Johnston, Mr A J Ramsden and Dr W M Spiers

EQUAL PAY

An employment tribunal struck out an applicant employee's equal pay claim in respect of like work as frivolous, as having no prospect of success, on the ground that any meaningful comparison as to the chosen comparators doing like work to the applicant had ceased more than six years before the presentation of the originating application.

LINDSAY J, allowing an appeal by the applicant, said that the use of the present tense in section 1(2)(a) and (4) of the Equal Pay Act 1970 had given rise to an argument that the comparison required by the Act was one between a man and a woman contemporaneously in the same employment and doing like work, but such a construction would have conflicted with the broad purpose of article 119 (now article 141 EC) of the EC Treaty, which required each member state to give effect to the principle of equal pay for male and female workers for equal work or work of equal value. In *Macarthys Ltd v Smith* (Case 129/70) [1980] ICR 672, 690, para 11, the view that contemporaneity was not required was upheld by the Court of Justice. The appeal tribunal could see no source for the six-year comparator bar. There was no formal rule of law that only the circumstances attendant on a chosen comparator in the period of six years before the presentation of an originating application could be relied on as a matter of effective comparison by an applicant. The six-year comparator bar was not a requirement of law. The applicant's union were right to argue that the six-year rule applied only to the period for which compensation could be sought and not to the period of the events with which comparison could be made. While the applicant's reliance on comparison with the comparators at distant times would be likely to put considerable difficulties in her way, they were difficulties of fact not law and needed to be resolved on the evidence. The tribunal had erred in law, as, instead of looking in to the evidence, it had felt able to dispense with such inquiry and rule on the issue as if it was one of law, one of frivolity and fitness for a striking out.

Kells v Pilkington plc; 2 May 2002; EAT/1435/00
EAT: Lindsay J, Mr P Dawson and Mrs D M Palmer

PRACTICE

In proceedings by applicant employees complaining that they had been unfairly dismissed, the respondent employers applied for an order requiring the applicants to retain different solicitors from the firm representing them on the ground that, that firm having recently acted for the respondent, there was a conflict of interest which affected the respondent's right to a fair hearing under article 6 of the European Convention on Human Rights. The employment tribunal chairman, applying *Bache v Essex County Council* [2000] ICR 313, refused the application.

WALL J, dismissing an appeal by the respondent, said that the respondent argued that the chairman had erred in holding that section 6(1) of the Employment Tribunals Act 1996 rendered the tribunal powerless to order a party's solicitor to cease to act where there was a conflict of interest, given the overriding objective under regulation 10 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001 and the tribunal's powers under rules 4 and 11 of the Rules of Procedure. It was said that *Bache* was distinguishable; that its effect was merely that a tribunal could not compel a party to be unrepresented. The applicants submitted that the employment tribunal, and the appeal tribunal, which were creatures of statute, had no power to prevent a representative chosen by a party from acting for that party. Though, at first blush, when section 6 was considered in the context of article 6 of the Convention, that appeared a somewhat startling proposition, the appeal tribunal were satisfied that it was sound, that *Bache* applied and that there was no error in the chairman's ruling. The right to a fair hearing under article 6 did not require section 6 to be read as though it enabled the tribunal to require a party to dispense with his chosen representative. *Bache* established a very important point of principle and was binding. The existence of any power to interfere with representation before the employment tribunal would require clear statutory authority, and that was not provided either by the Human Rights Act 1998 or the introduction of the overriding objective. In any event, considering the matter on its merits, neither the applicants nor their solicitors took the view that there was a conflict of interest, and the solicitors had, furthermore, sought advice on the propriety of continuing to act from the professional ethics department of the Law Society and also asserted that they had acquired no confidential information relating to the respondent. The appeal failed both on the issue of principle and on the merits.

Dispatch Management Services (UK) Ltd v Douglas; 4 December 2001; EAT/902/01
EAT: Wall J, Mrs D M Palmer and Mr G H Wright

RACE DISCRIMINATION

An applicant complained that the Prison Service had discriminated against him on racial grounds, inter alia, when he failed an assessment test, taken with a view to his becoming a prison officer. The employment tribunal concluded that the applicant had been unable to demonstrate that S, a candidate of a different race to the applicant, did not meet the standards required and that there was no evidence that the applicant had been treated any differently to S; and it dismissed the complaint.

JUDGE WILKIE QC, dismissing an appeal by the applicant, said that the applicant submitted that the tribunal's decision did not pose, specifically, the relevant questions and, by failing to do so, the tribunal had fallen into error in failing to consider, as a comparison exercise, the position of a hypothetical comparator. On the face of it, the respondent accepted that, the applicant's case being presented on the basis of an actual comparator, S, the tribunal, in its process of reasoning, had not had regard to any hypothetical comparator. The applicant relied on *Lindsay v Alliance & Leicester plc* [2000] ICR 1234 and two unreported decisions of the Employment Appeal Tribunal: *Hackney London Borough Council v Fashola* (12 January 1996) and *Jarman v Stenning*. In each of those cases, however, it seemed clear that the requirement was to look at the hypothetical comparator as an alternative to looking at a real comparator, such that, if there was a real true comparator with whom a comparison might be made, and the tribunal had made that comparison, it was not then obliged to construct a hypothetical comparator. The logic of that seemed clear, and it was hard to see how any sensible construction of a hypothetical comparator could lead to any different result than arose from the comparison with the true comparator. *Balamoody v United Kingdom Central Council for Nursing Midwifery and Health Visiting* [2002] ICR 646, where there was no true comparator, did not assist the applicant's contention that where there was a true comparator there was a further duty to construct a hypothetical comparator. That submission was rejected. S had been put forward as a true comparator, in so far as it was his performance on the assessment exercise that was being compared with that of the applicant, and the tribunal had accepted his example as a true comparison. Even if there was an obligation to construct a hypothetical comparator, the way in which the tribunal had explained itself satisfied that requirement.

Williams v Prison Service; 7 February 2002; EAT/1236/00
EAT: Judge Wilkie QC, Ms S R Corby and Dr D Grieves

SEX DISCRIMINATION

An employment tribunal rejected a claim by a pregnant employee that she had been discriminated against by her employer contrary to the Sex Discrimination Act 1975 on the ground that, although the employer had failed to make a risk assessment in breach of regulation 16(1)(b) of the Management of Health and Safety Regulations 1999, the employee had not been treated less favourably than a man or non-pregnant woman in that the employer would not have undertaken a risk assessment for any of her employees.

JUDGE McMULLEN QC, allowing an appeal by the employee, said that *Day v T Pickles Farms Ltd* (Recent Points [1999] ICR Part 7) clearly indicated that a failure to carry out a risk assessment could be a detriment within the meaning of the Sex Discrimination Act 1975. The employment tribunal were bound by that judgment and ought to have applied it. In the extended reasons the tribunal said that they were being asked to widen the definition of discrimination to encompass a failure of an employer to treat a woman more favourably than a man. The proper approach was to construe the 1975 Act by reference to the Equal Treatment Directive 76/207/EEC and the Pregnant Workers Directive 92/85/EEC. It was not necessary for the treatment of the employee by the employer to be compared with the employer's treatment of a comparable male employee or non-pregnant female employee: see *Webb v Emo Air Cargo (UK) Ltd (No 2)* [1995] ICR 1021. If the basis of the treatment was pregnancy, it was unlawful, irrespective of the employer's comparable treatment of men, or non-pregnant women. The proper approach in construing treatment was to consider not just dismissal but working conditions. The protection of a woman's biological condition during and after pregnancy indicated a special relationship which had to be protected. One way in which it was protected was by carrying out a risk assessment pursuant to the 1999 Regulations. Failure to do so impacted disparately on pregnant workers and was discrimination. The employment tribunal had erred in their approach to the application of the 1975 Act. They had failed to construe it so as to give effect to the Pregnant Workers Directive and to apply the 1999 Regulations to the allegation of sex discrimination made by the employee.

Hardman v Mallon (trading as Orchard Lodge Nursing Home); 25 March 2002; EAT/360/01
EAT: Judge McMullen QC, Mr D A C Lambert and Miss A Mackie

TIME LIMIT

An originating application making a complaint of unfair dismissal, posted to the tribunal a week before the expiry of the three-month time limit in section 111 of the Employment Rights Act 1996, did not arrive until a month later. The employment tribunal, ruling that it had no jurisdiction to hear the complaint under section 111(2), found that, had the application been received in the normal course of the post, it

would have been presented in time, but that, as there had been only a few days to the expiry date when i was posted, the applicant ought to have checked with the tribunal office that it had arrived, and that it hac been reasonably practicable for the application to have been presented in time.

JUDGE WILKIE QC, allowing an appeal by the applicant, said that, on the authorities, there was a world of difference between a case in which an applicant acting in person submitted an application in gooc time—so that in the normal course of post it would be received in time and no alarm bells rang when the tribunal, as in the present case, took several weeks to acknowledge its receipt—and the case where ar applicant acted through solicitors, whose professional duty encompassed having in place systems to aler them when applications, sent in good time, were not acknowledged as having been received in what they knew to be the normal course of business. The employment tribunal had failed to have regard to the fac that, in the present case, the applicant was acting in person, not represented by solicitors, and, as a consequence of that, it had applied a test of prudence appropriate to solicitors. The tribunal had failed to pose the question which would frequently be, and in the present case was, highly relevant, namely, whethe the fact that the application had not arrived in time was substantially the fault of the applicant. A persor acting without the benefit of legal advice was entitled to assume that a document would arrive in the normal course of the post. It would be an unreasonable imposition on such an applicant to require her to contact the tribunal office. In the present case the three weeks or so delay was reasonable, and there was no prejudice to the respondent in the appeal tribunal deciding that the employment tribunal did have jurisdiction to determine the applicant's complaint.

Grossman v Barnet Healthcare; 22 February 2002; EAT/134/01
EAT: Judge Wilkie QC, Mr T C Thomas and Mr N D Willis

COMPENSATION

An employment tribunal upheld an employee's complaint of unfair dismissal on the ground that the employers had not sufficiently investigated the employee's misconduct. Without affording counsel the opportunity to make submissions on contributory conduct, the tribunal went on to hold that the employee's compensation should be reduced by 75% on the basis that there was only a 25% chance that he would not have been dismissed had the dismissal been procedurally correct.

MR RECORDER LANGSTAFF QC, allowing an appeal by the employers, said that it was an elementary principle of law and procedure, sometimes referred to as a principle of natural justice, that each party had a right to be heard. Part of that principle necessarily involved a party having the opportunity within reason to address the tribunal on the issues before it. Where a tribunal reached a decision on a discrete issue without giving the opportunity to either party to address that issue, there would be a failure of natural justice. If the judgment that had to be made to establish the percentage was to be regarded as a separate legal issue, it was not one which the parties had been invited to address. If, however, it was to be regarded not as a discrete legal issue but as part and parcel of the determination of unfairness, then it would not necessarily be required of the tribunal to ask the parties for their submissions. Essentially, the appeal turned on whether the determination of the "*Polkey* percentage" was a determination of a separate legal issue. It was argued on behalf of the employee that, given that there was an obligation on an employment tribunal to reach a determination as to that percentage and given that the tribunal was equally entitled, as *King v Eaton Ltd (No 2)* [1998] IRLR 686 demonstrated, in some circumstances at least to refuse to hear further evidence on that issue, a tribunal was equally entitled not to hear submissions on the evidence it had heard before reaching a determination. That submission was rejected. First, *Polkey v A E Dayton Services Ltd* [1988] ICR 142 itself drew a distinction between procedural fault and the economic consequence in terms of compensation for that fault. Secondly, it was common ground that the tribunal were engaged on a hearing as to liability first and were not engaged on any issue related directly to compensation. Counsel for the employee properly conceded that, if the tribunal had come to a conclusion following deliberation as to the amount of compensation to be paid without inviting any further evidence or submissions, there would have been a clear sense of injustice. The present position was analogous. Further, it was customary for tribunals to invite advocates to make submissions as to the percentage chance in respect of the *Polkey* deduction. That recognised the fact that it was not naturally evident to an advocate that the point arose as being bound up inextricably with a decision as to the unfairness of the dismissal. Accordingly, where a tribunal had before it a case in which it was considering reaching a decision that a dismissal was unfair on procedural grounds, then, unless it had given the parties an opportunity to address it as to that aspect of the case before retiring, it should raise with the parties the possibility that submissions might make a difference to the determination before proceeding to place a figure on it. The tribunal was not entitled to resolve an issue in the absence of submissions by the parties where that issue was of fundamental importance to the amount of compensation.

Market Force (UK) Ltd v Hunt; 10 April 2002; EAT/393/01
EAT: Mr Recorder Langstaff QC, Mr W Morris and Ms H Pitcher

EMPLOYMENT APPEAL TRIBUNAL

At the preliminary hearing of an appeal by an applicant against the dismissal, by an employment tribunal, of her complaint against a respondent claiming sovereign immunity, the Employment Appeal Tribunal formed the view that it was arguable that the provisions of the State Immunity Act 1978 infringed article 6 of the European Convention on Human Rights in the circumstances giving rise to the appeal. The appeal tribunal made an order permitting the appeal to proceed to a full hearing but staying that appeal pending the judgment of the European Court of Human Rights in *Fogarty v United Kingdom* [(2001) 34 EHRR 302]. The respondent High Commission, while asserting that there had been no submission to the jurisdiction, invited the appeal tribunal of its own initiative to review that order and dismiss the appeal, contending that the appeal was unrelated to the pending decision in *Fogarty* and that by virtue of the commission's sovereign status the appeal tribunal did not have jurisdiction to make an order allowing the applicant's appeal to proceed.

MISS RECORDER SLADE QC, declining to review the order, said that on 21 November 2001 the European Court of Human Rights held that there had been no violation of article 6(1) of the Convention in *Fogarty*, and, as suggested by the High Commission, no doubt to avoid any argument that it had submitted to the jurisdiction, the appeal tribunal would consider of its own motion whether its earlier order should be reviewed. The power of the appeal tribunal to review its orders was contained in rule 33 of the Employment Appeal Tribunal Rules 1993 and had been considered in *Blockleys plc v Miller* [1992] ICR 749 and *Digital Equipment Ltd v Clements (No 2)* [1997] ICR 237 in which Morison J observed, at p 240B, that the appeal tribunal "has no power to hear an appeal against its own decision and should not

purport to do so". The High Commission had invited the appeal tribunal to review its earlier decision on the basis of a re-assertion of statutory state immunity and an argument that the judgment in *Fogarty* was immaterial to the current appeal as Mrs Fogarty's claim was based on an allegation of sex discrimination whereas the applicant's claim was based on an alleged breach of contract. The appeal tribunal was of the view that those arguments invited a rehearing of the preliminary hearing of the appeal; and, on a proper construction of rule 33 in the light of *Blockleys* and *Digital Equipment*, the appeal tribunal was not satisfied that the grounds on which it was invited to exercise its review jurisdiction enabled it to do so.

Onwuemene v Nigerian High Commission; 14 March 2002; EAT/13/01
EAT: Miss Recorder Slade QC, Mrs T A Marsland and Mrs D M Palmer

STRIKING OUT

An employment tribunal chairman struck out an applicant's complaint of sex discrimination after neither the applicant nor her representatives had attended an interlocutory hearing and he had found it "hard to accept" the representative's explanation that she had entered the wrong date in her diary. The chairman held that, although the originating application did not set out the facts, it was not itself frivolous or vexatious, but that the manner in which the proceedings had been conducted by and on behalf of the applicant had been frivolous or vexatious.

LINDSAY J, allowing an appeal by the applicant, said that there was no event or fact which could have led to the applicant herself being held to have been frivolous or vexatious against the background of the matter being conducted largely, or wholly, by a representative. It would seem that it was the conduct of the representative, therefore, that gave rise to the offending conduct, but the representative's conduct was not to be held to be wilful or contumelious. There was no suggestion of a deliberate abuse of process, nothing by way of behaviour intended to be contemptuous of the court. Though it was not right to draw very close parallels between the position in the High Court and the position in the employment tribunals, what was just in one was likely to be just in the other; equally, what was unjust in one was likely to be unjust in the other. Even before the recent reforms in the High Court it was relatively unusual for a case to be struck out for conduct where there was nothing contumelious about the conduct and where there had been no "unless order". One important consideration seemed not to have loomed at all in the chairman's thinking in his decision to strike out. That was how far the failure of the representative to attend the interlocutory hearing had materially prejudiced a fair trial of the case, it being remembered that the chairman did not find the pleadings themselves to be frivolous or vexatious. He did not say that the representative's reasons for non attendance were not to be believed, but that they were "hard to accept". What he had before him was a case that could not be regarded as one of wilful default or contumelious error on the part of the representatives but simply total incompetence or negligence on their part. The chairman never addressed the question which the appeal tribunal regarded as an important one, namely, whether a fair trial truly was prejudiced by the non attendance. It was an error of law not to address that crucial factor, though that was not to say that it would necessarily have been determinative.

Lee v Police Information Technology Organisation; 18 February 2002; EAT/185/01
EAT: Lindsay J, Mr D A C Lambert and Mr K M Young

UNFAIR DISMISSAL

An employment tribunal held that, by failing to consult the applicant employee or to take steps to determine whether alternative employment was available, the respondent employers had acted unreasonably, in terms of section 98(4) of the Employment Rights Act 1996, when they failed to renew the employee's fixed term contract; and the tribunal upheld the employee's complaint of unfair dismissal.

LORD JOHNSTON, dismissing an appeal by the employers, said that the employers submitted that the employment tribunal had misdirected itself in law in that it did not apply its mind to the test relating to the "band of reasonable responses", and had, in any event, determined, contrary to authority, that a failure to consult automatically rendered a dismissal unfair when related to redundancy. The appeal tribunal was of the opinion that when the issue was one of redundancy, in the sense that the reason for dismissal had been established as such, the test of the band of reasonable responses had no operation. That was an appropriate way to assess the reasonableness of an employer's conduct in the context of misconduct, but, in the context of redundancy, which was a decision made by the employer, there was no factor which required a response. What the statute enjoined the employer to do, having embarked on a redundancy process, was to act fairly and reasonably in carrying out the selection process. Reference had been made to *Chronos Richardson Ltd v Watson* (Recent Points [2001] ICR Part 5) in which the appeal tribunal referred to "range of reasonable conduct". The word "conduct" was wholly appropriate in the context of assessing the reasonableness of the employer's actions and was nothing to do with the narrower test of band of reasonable responses which had relevance and importance in the context of dismissal based on misconduct after an investigation had been carried out. The "response" was to the investigation and its results. In the circumstances, while the appeal tribunal accepted that lack of consultation in itself did not render dismissal for redundancy automatically unfair, if it was clothed, as in the present case, with an additional factor,

namely, failure to investigate alternative employment, which would have been bound to arise in the consultation process had it been undertaken, the matter became both broader and easier to assess. The employment tribunal had properly considered the employers' conduct in that context and had determined the correct question, namely, that the employers did not act reasonably in failing to consult and to consider alternative employment.

Dundee City Council v Selbie; 3 May 2002; EAT/1060/01
EAT: Lord Johnston, Dr A H Bridge and Mr R P Thomson

WAGES

On her claim for unlawful deduction from wages in respect of unpaid overtime, an employment tribunal awarded an employee payments for hours worked in excess of the maximum number of 48 hours a week including overtime prescribed by regulation 4(1) of the Working Time Regulations 1998.

JUDGE PETER CLARK, allowing an appeal by the employers, said that the starting point was the express term of the employee's contract of employment which provided that overtime rates were payable only if overtime was specifically authorised in writing. There was no evidence that such authorisation had ever been given. Regulation 4(1) did not assist the employee in her overtime claim, whether by way of unlawful deduction or breach of contract, for the following reasons. Regulation 4(1) said nothing about a worker's entitlement to overtime payments, and, assuming that the employers had breached regulation 4, by requiring the employee to work in excess of 48 hours per week, and were thereby in breach of a statutorily implied term of the contract, such breach did not sound in damages and could not form the basis for an unlawful deduction claim under section 13(3) of the Employment Rights Act 1996. The enforcement machinery provided for in the 1998 Regulations did not extend to a right to compensation for breach of regulation 4 per se. Regulation 30(1) listed those breaches of specific provisions leading to an order for the payment of compensation. Regulation 4 was not included in the list. It was important to appreciate the purpose of regulation 4 and the underlying Directive 93/104/EC. It was to protect the health and safety of workers and the remedies for non compliance were contained in sections 45A and 101A of the 1996 Act. It followed that the tribunal erred in finding that the employee was legally entitled to overtime payments such that a failure by the employers to make such payments amounted to an unlawful deduction from wages.

Forbuoys Ltd v Rich; 19 April 2002; EAT/144/01
EAT: Judge Peter Clark, Mrs D Palmer and Mr H Singh

DISCIPLINARY PROCEEDINGS

An employer's disciplinary code provided under the heading "gross misconduct" that summary dismissal would occur when an employee behaved in such a manner that it was unreasonable to expect the company to accept or risk a continuation or repetition of the same or similar behaviour and a list of categories of conduct followed which included abusive, objectionable or threatening behaviour to employees. It was also provided that in all cases of disciplinary action the need to satisfy the test of reasonableness applied and mitigating factors would be taken into account. An employee, who was summarily dismissed for gross misconduct following an incident when he swore and threw down a telephone receiver which then struck another employee, had his complaints of unfair dismissal and wrongful dismissal upheld by an employment tribunal.

MR RECORDER BURKE QC, dismissing an appeal by the employer against the finding of wrongful dismissal, said that the employer submitted that the express terms of the contract were such that the tribunal was not entitled to consider whether the conduct complained of was gross misconduct in the ordinary sense, i e so serious as to be repudiatory, but was entitled to consider only whether the conduct fell within the contractual definition, namely, any behaviour which fell within the categories listed however trivial. The effect of setting out categories in the contract, however, was to establish between the parties what kind of conduct might be regarded by the employer as gross misconduct; in the absence of sufficiently specific words, it did not produce the result that conduct falling within one of the categories was automatically to be treated as sufficient to justify summary dismissal, however trivial that conduct might be; and the tribunal was not shut out from considering, and needed to consider, whether the conduct relied on was sufficiently serious to be repudiatory. In *Neary v Dean of Westminster* [1999] IRLR 288, 291 Lord Jauncey of Tullichettle said that conduct justifying dismissal "must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment". There was no reason, in the absence of clear words to the contrary, why that well established principle should not apply in the present case. Even if that conclusion was wrong, the particular contractual terms in the present case produced a position more favourable to the employee than in a case where there were no contractual terms at all; at common law consideration of whether the conduct complained of was repudiatory would not involve consideration of overall reasonableness or mitigating factors. The words "the test of reasonableness" in the contractual provisions were sufficiently broad to require the tribunal to consider, in deciding whether the dismissal was wrongful, all the facts and matters which could sensibly be relevant to the question whether it was reasonable for the employer summarily to dismiss. Thus procedural defects on the part of an employer might be relevant, even though the tribunal concluded that the conduct complained of had been committed. Similarly, having regard to the contractual terms, the tribunal was bound to take into account mitigating factors. On the findings of fact made by the tribunal, their conclusion that the dismissal was wrongful was not perverse.

British Bakeries Ltd v O'Brien; 26 April 2002; EAT/1479/00
EAT: Mr Recorder Burke QC, Mr J R Rivers and Mr A D Tuffin

MINIMUM WAGE

An employer was served with an enforcement notice issued by a compliance officer under the National Minimum Wage Act 1998 requiring the employer to pay at least the national minimum wage to an employee and ordering, pursuant to section 19(2), the payment of £4,925.90 to the employee, which the compliance officer determined as the shortfall of what should have been paid on the basis of information given to him by the employee. On an appeal by the employer, the employment tribunal concluded, with regard to the payment required by the notice, that the evidence was so unsatisfactory as to the hours worked by the employee that it was wholly unsafe to draw any conclusion from which a calculation could be made, and it ordered the enforcement notice to be rectified by striking out the provision for payment.

MR RECORDER LANGSTAFF QC, allowing an unopposed appeal by the Inland Revenue, said that, if it was established by an employer to the satisfaction of the employment tribunal, under section 19(6)(c)(ii), that an enforcement notice was in error in specifying the wrong sum due to the worker, the employment tribunal were under a duty, under section 19(8), to insert the right figure. On their own recitation of the facts, it appeared that the evidence had satisfied employment tribunal, and therefore the employer had established, that the amount specified in the enforcement notice was incorrect. The tribunal should then have proceeded to do their duty under section 19(8) to rectify the notice. Given that duty, and given that no burden of proof applied to that exercise, what was required of the tribunal was to do the best they could on the material available to provide the best estimate of the amount that should have appeared in the notice. But the tribunal could not decide that the task was so difficult that they would simply award no payment at all. They had to give their best estimate, accepting all the imperfections and uncertainties of the material before them. The matter would be remitted to the same tribunal for a determination under section

19(8). They would no doubt wish to hear such further evidence as either the employer or the appellant sought to put before them, but the scope of the inquiry was simply into what figure there should be in rectification of the enforcement notice as to the amount due to the employee in respect of the best estimate of the hours that she had worked.

Inland Revenue Commission v St Hermans Estate Co Ltd; 2 May 2002; EAT/121/01
EAT: Mr Recorder Langstaff QC, Ms N Amin and Mr D J Hodgkins

REDUNDANCY PAYMENT

Redundancy payments for three applicant ancillary school workers, whose contracts required them to work for only 44 weeks each year, were calculated by their employer on the basis of a week's pay arrived at by dividing their annual salary by 52. Complaints by the applicants that one week's pay should have been calculated as 1/44th of the annual salary were dismissed by an employment tribunal chairman.

WALL J, allowing an appeal by the applicants, said that the chairman had been persuaded to uphold the employer's calculation in the main by the point that payments of salary were made to the applicants monthly throughout the year, and that each was, therefore, employed throughout the year. The case had been argued before the appeal tribunal on the basis that the applicants' contracts of employment were annual, though there appeared to be a highly arguable case to the contrary. But the reality at the heart of each contract was that the applicant was paid to work for a total of 44 weeks a year and was not required to work, did not work and was not paid to work in the remaining weeks of the year. In the context of the terms of the contract, it was difficult to regard the manner of payment "in 12 equal instalments" as being anything other than an administrative convenience. It did not follow, because the applicants' pay was artificially divided into 12 monthly instalments, that, for the purposes of section 221(2) of the Employment Rights Act 1996, their remuneration for employment in normal working hours did not vary with the amount of work done in the period. The remuneration did vary—not during the weeks they actually worked—but during the weeks they did not work at all. The applicants' "normal working hours" must mean the hours they worked in a normal working week. The phrase could not mean no hours in weeks when they were plainly not required to work. A week's pay had to relate to a week's work. Since the applicants were required to work, and were paid to work, for only 44 weeks it seemed just that their modest redundancy payments should be calculated on the basis of the weeks they actually worked and not on the basis of a notional 52-week calculation which took into account weeks they did not work and for which they were not paid to work.

Gilbert v Barnsley Metropolitan Borough Council; 12 April 2002; EAT/674/00
EAT: Wall J, Mrs J M Matthias and Mr D Norman

REVIEW

The response, on 12 May 2000, to an applicant's application for a review of the decision of an employment tribunal was that the chairman had directed that the application should be heard by the tribunal and that a notice of hearing would be sent shortly. On 12 June 2002, no date having by then been fixed, the applicant was sent a further letter stating that, on further consideration, the chairman had revoked his earlier decision and that, in exercise of his powers under rule 11(5) of the Employment Tribunals Rules of Procedure 1993, he refused the application for a review on the ground that it had no reasonable prospect of success.

LINDSAY J, dismissing an appeal by the applicant against the refusal of his review application, said that, on the merits, the chairman had been entitled to take the view that the review had no reasonable prospect of success. The question was whether there was procedural error in the change between his first and second letters. Rule 11(5) of the Rules of Procedure provided no deadline by which the chairman's power to refuse, if it was to be exercised at all, had to be exercised. It did not say that the power could not be exercised if some indication had been given under rule 11(6). It did not say that the power could not be declined once and then exercised after all. There was nothing to say that the power under rule 11(5) was spent once a general indication had been given that there would be a hearing under rule 11(6), still less that rule 11(5) was spent even before a notice of hearing was given under rule 11(6). There was no time beyond which the ability to refuse under rule 11(5) became specifically inoperative, except impliedly, from the terms of rule 11(6), that power under rule 11(5) must become inoperative once the hearing of the tribunal under rule 11(6) had been started. That was, impliedly, the final point at which the power under rule 11(5) must become incapable of exercise. There was no need to imply some time limit that was not expressly put there, or even to create a reference to some events or circumstances which were not expressly referred to. Until the hearing of a review application by the employment tribunal began the chairman's power under rule 11(5) remained open to be exercised by him. Though it was not to be encouraged that the matter should have been dealt with as it was, there was no error of law in the chairman's decision.

Ece v Newham London Borough Council; 22 February 2002; EAT/1035/00
EAT: Lindsay J, Mr I Ezekiel and Mr G H Wright

STRIKING OUT

At the hearing, in November 2000, of an employee's complaint, inter alia, of unfair dismissal, the first respondent, the employee's former employer who had sold his business to the second respondent, applied to strike out the originating application, alleging that the employee had failed to comply with directions. The tribunal decided to strike out the originating application under rule 13(2)(e) of the Employment Tribunals Rules of Procedure 1993 on the ground that the conduct of the proceedings had been vexatious.

JUDGE REID QC, allowing an appeal by the employee, said that the tribunal decided that it was not necessary for the employee to have been given notice of the application to strike out because she was present and represented by her husband who was given an opportunity to show cause orally why a striking-out order should not be made. That was at best a doubtful decision because it meant that the husband had to deal with the matter without any opportunity to consider or formulate his arguments against it. Looking at the matters of complaint relied on by the tribunal in striking out, there were doubts as to whether their draconian decision was one which they ought to have taken, even on their view of the law. However, it was clear that they did not have available authorities now conveniently gathered together in the judgment of the Employment Appeal Tribunal on 20 March 2002 in *Wilson v De Keyser Ltd* and did not, as they should have done, take into account the issue of whether or not a fair trial could still take place. Although there were some issues of fact in the case, they were of a comparatively limited nature and there was nothing to suggest that it would not now be possible for the case to be tried fairly. In those circumstances, the tribunal were wrong in law to reach the conclusion they did and they should have rejected the application to strike out. It was clear that there had been a transfer of an undertaking and that under regulation 5(2) of the Transfer of Undertakings (Protection of Employment) Regulations 1981 any liability the first respondent might have had now fell on the second respondent. The appropriate course was, therefore, to remit the matter for hearing by a different tribunal as against the second respondent only.

Preedy v Smith (trading as Easterhill Furniture); 26 April 2002; EAT/193/01
EAT: Judge Reid QC, Mr B V Fitzgerald and Ms G Mills

TIME LIMIT

An applicant employee was dismissed on 21 May 1999 when his employer's premises were destroyed by fire. Shortly afterwards, he and two fellow employees obtained Form IT1s, completed them by claiming redundancy payments and sent them off to the employment tribunal, but they were not received. In January 2000, when the applicant heard that another employee had had his case determined by an employment tribunal, he presented a second complaint, outside the six-month limitation period in section 164(1) of the Employment Rights Act 1996. An employment tribunal chairman decided that it would not be just and equitable to extend time under section 164(2) and dismissed the applicant's claim.

JUDGE PETER CLARK, allowing an appeal by the applicant, said that the applicant submitted that the chairman ought to have elicited from him the fact that his literacy was severely handicapped from a hearing disability as a child and that was a relevant factor which fell to be considered. That could not be accepted. There was no duty on the employment tribunal to tease out evidence which a party had forgotten to adduce at the hearing. The inexperience or incompetence of the party was not a relevant consideration on appeal. Reference had been made to *Harvey on Industrial Relations and Employment Law*, vol 1, E[2137.01] where, in relation to section 164(2) and (3), it was stated: "The relevant question for the employment tribunal includes whether the applicant is, in a broader sense, deserving of a redundancy payment." That bold statement was unhelpful and potentially misleading. It might suggest an unlimited discretion to award a redundancy payment to an applicant who had not complied with section 164(1) in a deserving case. The employment tribunal had a wide discretion to extend time if in all the relevant circumstances it was just and equitable to do so. Those circumstances had to relate to the late application, not the underlying merits of the claim, subject to the limited inquiry as to merits suggested by Phillips J in *Hutchison v Westward Television Ltd* [1977] ICR 279. On that footing, the editors correctly stated the position at E[2138]. The question was whether the chairman had failed to consider "all the other relevant circumstances" referred to in section 164(3)(b). The applicant correctly submitted that the tribunal's approach to the questions raised by section 164(2) and (3) mirrored those raised by section 76(5) of the Sex Discrimination Act 1975 and section 68(6) of the Race Relations Act 1976. In *British Coal Corpn v Keeble (No 2)* [1997] IRLR 336 Smith J endorsed guidance given when exercising the just and equitable discretion under the 1975 Act that tribunals should adopt as a check list the relevant mandatory factors in section 33 of the Limitation Act 1980, and that approach was expressly approved in *Director of Public Prosecutions v Marshall* [1998] ICR 518. It was clear that the chairman had considered only the question raised by section 164(3)(a) of the 1996 Act, which equated with section 33(3)(a) of the 1980 Act. He did not go on to consider all the *other* relevant circumstances. By extension those included the factors listed at section 33(3)(b)–(e) as well as the balance of prejudice question. The matter would be remitted for rehearing by a fresh tribunal. At that hearing it would be open to the applicant to lead evidence as to his literacy not placed before the chairman on the last occasion.

Patchett v Greenwoods (Interiors) Ltd; 17 May 2002; EAT/634/00
EAT: Judge Peter Clark, Ms S R Corby and Mrs D M Palmer

CONTRIBUTORY FAULT

An employment tribunal, on an employee's complaint of unfair dismissal, concluded that the employee had not had a fair disciplinary hearing and, on balance, the dismissal was unfair, but that he was guilty of 100% contributory conduct, and it went on to reduce both the basic and compensatory awards by 100%, without giving the parties the opportunity to make submissions on the issue on contributory conduct.

MS RECORDER SLADE QC, dismissing an appeal by the employee, said that it was clear from sections 123(6) and 122(2) of the Employment Rights Act 1996 that there was power to reduce compensatory and basic awards to a nil amount. That power was unfettered; and the 100% reduction was plainly open to the tribunal on the findings of fact it made. The employee submitted that the tribunal had erred in failing to inform him that it was going to consider the question of contributory fault, thus depriving him of opportunities to adduce evidence and make submissions on the point. Employment tribunals were masters of their own procedure, and it was clear that the question of a nil award had been raised in the employer's notice of appearance; but it was also apparent that the tribunal had not informed the parties expressly that it would proceed to consider the question of deduction for contributory fault at the same time as considering the fairness of the dismissal. It was an aspect of the fair conduct of proceedings that parties should be informed by the tribunal of what it would consider and decide at each stage of the proceedings: see *Iggesund Converters Ltd v Lewis* [1984] ICR 544, 552G. It was the question of contributory fault that was most liable to give rise to confusion which could be avoided if employment tribunals made it clear when that issue would be considered. In the present case the tribunal had not done so. However, considering the arguments which the employee would have advanced had he been asked, no injustice had been caused by the failure to make clear to the parties that contributory fault would be considered at the same time as the tribunal considered the fairness of the dismissal.

Green v Robins & Day Ltd (trading as Warwick Wright Clapham); 22 May 2002; EAT/83/01
EAT: Ms Recorder Slade QC, Mr D J Jenkins and Mr P A L Parker

PRACTICE

At a pre-hearing review of an applicant's complaints of race and sex discrimination against 19 respondents, an employment tribunal ruled that the complaints against 16 respondents had no prospect of success and ordered the applicant to pay deposits as a condition of continuing with those complaints, pursuant to rule 7 of the Employment Tribunals Rules of Procedure 1993.

LINDSAY J, dismissing an appeal by the applicant, said that the applicant appealed on the ground, inter alia, that, contrary to rule 7(1) of the Rules, the employment tribunal had considered documents submitted by four respondents in their bundle. The appeal tribunal did not read rule 7(1) as precluding the tribunal from looking at material outside the originating application and notice of appearance, outside the representations in writing and outside the oral argument. They had to be considered but there was nothing to say that *only* those matters might be considered. For example, if the representations in writing in a contract case included reference to the contract, why should the contract itself not be referred to at the pre-hearing review? Moreover, if at the pre-hearing review in certain cases it became necessary to consider a party's means under rule 7(5), surely it would be open to the tribunal, and could not be seriously argued otherwise, that the means could be considered by reference to matters not in the originating application, not in the notice of appearance and not otherwise falling within rule 7(1). For example, surely in such a context it would not be improper for a tribunal to call for either an affidavit of means or for material documents such as payslips. There was nothing in rule 7(1) that made it automatically an error of law to consider documents going outside the specific headings of rule 7(1)(a)(b) and (c). What was relevant under rule 7(4) was necessarily somewhat limited and the fact that more documents chosen by the respondents were referred to than documents chosen by the applicant was, of itself, of no significance. The respondents had begun the case and so, necessarily, had to set it out and explain it in a way that later parties addressing the tribunal did not need to do. The appeal tribunal had been unable to find any error of law in the tribunal's decision.

Malkan v Chief Executive NHS Executive; 28 May 2002; EAT/1153/00
EAT: Lindsay J (President), Ms S R Corby and Mr P D Wickens

PROTECTED ACT

An employee who was alleging that he had been injured at work got a fellow employee to video the equipment concerned. When his solicitors disclosed the video to the employers' insurers, he was summoned to a hearing by his employers (who were concerned because the production process involved was confidential), at which he considered he was threatened that if he did not reveal who had made the

video he would be sacked. He later resigned without giving a reason. On his complaint of unfair dismissal, he claimed he had been constructively dismissed and that the dismissal was unfair under section 103A of the Employment Rights Act 1996 (inserted by the Public Interest Disclosure Act 1998) because the reason for his dismissal was that he had made a protected disclosure. The employment tribunal, dismissing the complaint, found that the employee had not been threatened as he alleged, that he had resigned of his own accord for his own reasons, that the making of the video could be a qualifying disclosure within section 43B(1)(d) of the Act but that the employee had not suffered any detriment thereby.

JUDGE REID QC, dismissing an appeal by the employee, said that, on the evidence, the tribunal had been entirely entitled to reach the conclusion that the employee left for his own reasons and not because of anything done or threatened by his employer. Though that disposed of any question of there being victimisation because of a protected disclosure, the appeal tribunal had reservations about the mere making of the video being a protected disclosure. That there was a protected disclosure at the point when the video was produced to the employee's solicitors was clear, and the introduction of an outsider who could witness the confidential process and make a video could be a protected disclosure, but the appeal tribunal was unconvinced that the making of the video by itself (if made by a fellow employee to whom nothing new was disclosed) amounted to a protected disclosure. For there to be detriment under section 47B of the 1996 Act "on the ground that the worker has made the protected disclosure", the protected disclosure had to be causative in the sense of being "the real reason, the core reason, the causa causans, the motive, for the treatment complained of" to borrow the words of Lord Scott of Foscote in the race relations case of *Chief Constable of the West Yorkshire Police v Khan* [2001] ICR 1065, 1082. Similarly, if the detriment was (as was suggested) dismissal, the making of the protected disclosure had to be the reason or principal reason for the dismissal. In the present case, not only was there no dismissal, but the steps taken by the employer were not because of any protected disclosure that tended to show "that the health or safety of any individual has been, is being or is likely to be damaged"; it was solely because of the perceived breach of confidentiality of the production process.

Aspinall v MSI Mech Forge Ltd; 25 July 2002; EAT/891/01
EAT: Judge Reid QC, Mrs D M Palmer and Mr A D Tuffin

STAY

A female police constable brought a complaint of sex discrimination against the commissioner of police, alleging that she had been exposed to sexual harassment by a police sergeant at a police station where she had been serving. In December 2001 a chairman, sitting alone, rejected a submission by the commissioner that the complaint should be stayed in the light of the Employment Appeal Tribunal's decision in *Chief Constable of Bedfordshire Police v Liversidge* [2002] IRLR 15 that a chief constable was not liable under the Race Relations Act 1976 for the acts of one police constable against another. The chairman also directed that a preliminary issue as to the commissioner's liability should be dealt with on the first day set aside for the full hearing.

MR COMMISSIONER HOWELL QC, dismissing an appeal by the commissioner, said that for all practical purposes the wording of the relevant sections of the Sex Discrimination Act 1975 and the Race Relations Act 1976 were similar so that there was obviously a strong argument that, so far as domestic law alone was concerned, the result in a sex discrimination case brought against a chief officer of police would have to be similar to that in *Liversidge*. Though things had inevitably moved on since the chairman made his decision, the propriety of that decision had to be judged in the light of circumstances as they stood before him at the time. It was now known that, as well as *Liversidge* and *Chief Constable of Cumbria v McGlennon* [see post, pp 1135 and 1156], another case against a chief officer of police had been set down for 17 days, the employment tribunal having refused a stay, whereas a number of other cases had been stayed pending resolution of the issue of jurisdiction. On behalf of the commissioner it was submitted that (1) the chairman had misdirected himself by taking into account the applicant's contention that the effect of Directive 76/207/EEC required the result in a sex discrimination case to be different from *Liversidge*; (2) the chairman had erred in allowing irrelevant considerations to be given undue weight in holding that the disadvantages of delay to the applicant outweighed the irrecoverable costs and inconvenience caused to the commissioner if preparation for the hearing turned out to be unnecessary; and (3) it was perverse to have ordered a preliminary hearing on the first day of the full hearing. The appeal tribunal were unable to see that any aspect of the way the chairman had decided the difficult application with which he was faced was open to challenge as a matter of law. It was also reasonable for him to reach the decision he did, and the direction that the preliminary issue should be dealt with at the start of the main hearing was not unjustified in such a way as to make his decision perverse. But, though the appeal would be dismissed, any question of whether a renewed application should be made to the tribunal chairman was not thereby precluded. Matters having moved on since the chairman's decision, there might be matters that either or both parties might wish to advance before the chairman as a reason for reconsidering, on a renewed application, the question of whether the proceedings should go ahead as listed or the form in which they should go ahead.

Comr of Police of the Metropolis v Reilly; 22 March 2002; EAT/115/02
EAT: Mr Commissioner Howell QC, Dr D Grieves and Mr W Morris

UNFAIR DISMISSAL

An employee was summarily dismissed from her employment as the resident manager of retirement properties for gross misconduct when earlier the same day her employers' estates director had formed the view that she was drunk on duty. An employment tribunal upheld a complaint of unfair dismissal by the employee on the ground that, although the director had had reasonable grounds for his belief that the employee had been drunk, that belief had not been formed after conducting a reasonable investigation and giving the employee a fair opportunity to present her case; and that a reasonable employer would have suspended the employee and warned her that she faced a formal disciplinary charge of being drunk on duty, a possible consequence of which was dismissal.

LINDSAY J, allowing an appeal by the employers and remitting the matter for rehearing, said that the "reasonable investigation" as part of the test in *British Home Stores Ltd v Burchell* [1980] ICR 303 was an investigation into the facts relating to the misconduct which was the subject of the employers' charge against the employee. One did not disprove the adequacy of the investigation by saying that the employee had not been fairly warned that she faced a disciplinary charge. The tribunal seemed to have confused factual investigation with the requirements of a fair procedure. The tribunal's approach seemed to suppose that there was only one thing any reasonable employer could properly have done in all the circumstances, namely, first to suspend, then formally to charge with a disciplinary offence, then to warn that dismissal was a possible consequence, then to hold a formal disciplinary hearing and then to act on the outcome of that hearing. But that ignored that the employers asserted that there had been gross misconduct, i.e. something entitling the employers to meet the conduct with a summary dismissal. Where there was something which amounted to or was genuinely believed to amount to gross misconduct, that long sequence which the tribunal saw as being reasonable did not invariably need to be followed. Moreover, and perhaps more importantly, the tribunal seemed to have shown no consciousness that what they should have been looking at was the band of reasonable responses. There were many cases where one could not say that a reasonable employer would have done only one thing and nothing else, in which a range of reasonable responses was open to the employer. It was an error of law not to inquire into whether the employers' action was within that band.

Retirement Care Group Ltd v Greener; 22 May 2002; EAT/689/00
EAT: Lindsay J (President), Dr D Grieves and Ms B Switzer

APPEAL

An employee's complaints of racial and sexual discrimination and unfair dismissal were dismissed by an employment tribunal. On her appeal to the Employment Appeal Tribunal, the appeal tribunal, at the preliminary hearing, directed the appeal to proceed on two only of the grounds in her notice of appeal.

MR COMMISSIONER HOWELL QC, dismissing the employee's appeal, said that some 12 months after the preliminary hearing and very shortly before the appeal was due to be heard, an indication was given on behalf of the employee that she was seeking to raise two further grounds of appeal. These were related to two points in the extended reasons which suggested that there might be some grounds for criticising the employer, the contention sought to be advanced being that the employment tribunal's failure to make more of them was a ground for setting their decision aside. The appeal tribunal were not, however, satisfied that a proper case had been shown for taking the exceptional course of exercising any discretion in that area that might still be open, following the order made on the preliminary hearing restricting the scope of the appeal. While the possibility of the appeal tribunal using its case management powers to allow some limited departure from the defined grounds of appeal on which an appellant had been permitted to proceed to a full hearing was not altogether ruled out, such cases were exceptional and subject, in particular, to the provisos that the point had been raised before the employment tribunal and that the appellant had explained why he had not appealed against the limiting of the grounds of appeal: *Miriki v General Council of the Bar* [2002] ICR 505, 517, para 28. Such a departure was not to be allowed where, as in the present case, there had been no explanation whatever why the additional contentions, relating to matters immediately apparent on the face of the extended reasons, could not have been raised in the notice of appeal or at the preliminary hearing or at any point before the very late stage at which it was sought to introduce them. For the need for a full, proper and acceptable explanation to support any application to the appeal tribunal for the indulgence of an exercise of discretion to admit appeals out of time, see also *United Arab Emirates v Abdelghafar* [1995] ICR 65, 70H–71B, approved by the Court of Appeal in *Aziz v Bethnal Green City Challenge Co Ltd* [2000] IRLR 111. In any event, the points sought to be added were not of substantial merit. Accordingly, the application for the appeal tribunal to exercise its discretion to extend the scope of the appeal beyond the two limited grounds directed for a full hearing was refused. The first ground of appeal for consideration related to the refusal to grant an adjournment. Employment tribunals were experienced in dealing with unrepresented parties and ensuring that they got a fair hearing of the case they were seeking to put forward, and the appeal tribunal had no doubt that there was nothing in the first ground. The appeal tribunal had reached a similar conclusion on the second ground, which questioned the way the tribunal had explained their reasons for not inferring racial discrimination by comparison with a possible comparator in the way sickness absence was treated. The appeal tribunal found no difficulty in following what the tribunal were quite clearly saying—that the two cases were materially different.

Qureshi v Camden London Borough Council; 11 June 2002; EAT/1173/00
EAT: Mr Commissioner Howell QC, Miss A Mackie and Mrs T A Marsland

COMPROMISE AGREEMENT

In 1998 an applicant employee settled her claims of sex discrimination and constructive dismissal against the hospital where she had worked on terms set out in a COT 3 agreement under which she received a sum "in full and final settlement of these proceedings and of all claims which the applicant has or may have against the respondent . . ." In 2000 she was asked by a surgeon to assist him as a technician at an operation to be performed privately at the hospital, which required her to be employed for the day by the hospital. When the hospital declined to sanction the arrangement, the applicant complained that she had been victimised because of her previous sex discrimination complaint against the hospital. An employment tribunal decided as a preliminary point that the 1998 agreement did not operate to preclude the applicant's further claim of victimisation.

JUDGE REID QC, dismissing an appeal by the hospital, said that the law as to contracts for release did not decline to allow parties to contract that all and any claims, whether known or not, should be released. The question in each case was whether, looking objectively at the compromise agreement, that was the intention of the parties, or whether in order to correspond with their intentions some restriction had to be placed on the scope of the release. If parties sought to achieve the extravagant result of releasing claims of which they had, and could have had, no knowledge, whether those claims had already come into existence or not, they had to do so in language which was absolutely clear and left no room for doubt as to what it was they were contracting for. There was no reason why as a matter of public policy a party should not contract out of some future cause of action, but it would require extremely clear words. In the present case there was nothing to indicate any intention to contract out of future claims. The expression "have or may have" was apt to cover existing claims whether known to the potential claimant or not. So far as the

ployee's present claim was concerned, that arose out of the alleged conduct of the hospital after the date the agreement. That conduct was actionable, if at all, only by reason of what had occurred earlier. But, was not the earlier actions of the hospital or anything which occurred in the course of the employee's ployment or in the events leading up to the making of the agreement which gave her her claim. What ve her her claim was the alleged conduct of the hospital in refusing to allow her to act as a technician in e late summer of 2000. The true construction of the agreement did not preclude her from bringing the esent proceedings.

Royal National Orthopaedic Hospital Trust v Howard; 14 August 2002; EAT/861/01
EAT: Judge Reid QC, Mr I Ezekiel and Mr G Wright

ME LIMIT

The Registrar of the Employment Appeal Tribunal refused to extend time for respondent employers to dge a notice of appeal against a finding of liability for unfair dismissal, in circumstances where their licitor had faxed the notice of appeal to the appeal tribunal on the day the 42-day time limit expired thout ensuring that the fax had been successfully transmitted and the fax had arrived the following day.

LINDSAY J, dismissing an appeal by the employers, said that any solicitor who left service of a notice of peal until late on the last day needed to take special care to ensure that it had been received by the appeal bunal by whatever means he attempted delivery. That was not done in the present case. In the cumstances, it was not some unreasonable counsel of perfection for the solicitor to have actually seen at the message had gone through, and, if it had failed to go through, to have remedied the situation. In *mden & Islington Community Services NHS Trust v Kennedy* [1996] IRLR 381 the appeal tribunal ted that, for a solicitor to act reasonably and without fault, there had to be a system in place which abled the solicitor to find out contemporaneously whether the conduct of business was taking a normal arse and to check, at or near the time, that replies which should have been received at a given date had in t been received. Though that was a postal, not a fax, case and was concerned with lodging an ginating application, rather than a notice of appeal, the principle remained that it was important that solicitor—especially where the case was a late service on the last day—should *contemporaneously* see t the conduct of business was taking a normal course. The traditional approach of the Employment peal Tribunal was to take a stringent line on late appeals, which approach, given the relatively generous iod of 42 days, was not improper.

David Webster Ltd v Holohan; 26 February 2002; PA/857/01
EAT: Lindsay J, President (as in chambers)

ME LIMIT

The Registrar of the Employment Appeal Tribunal refused a request by an appellant to extend the time appealing against an employment tribunal's decision that he should remain a respondent to sex crimination proceedings brought by an employee against her employers, a local authority, and against appellant, who was a councillor.

JUDGE PETER CLARK, dismissing an appeal by the appellant from the Registrar's decision, said that relevant domestic authorities applicable to a refusal of an extension of time for appealing were to be nd in *United Arab Emirates v Abdelghafar* [1995] ICR 65, approved by the Court of Appeal in *Aziz v thnal Green City Challenge Co Ltd* [2000] IRLR 111. Applying those principles, there was no doubt t the Registrar had exercised her discretion correctly. Waiting for a subsequent employment tribunal ision was not a good excuse for delaying the lodging of a notice of appeal against the first decision. It s, however, submitted that the guidance in *Abdelghafar* should be read subject to the Civil Procedure les and the Human Rights Act 1998. Attention had been drawn to CPR r 3.9, read with the court's nagement powers under r 3.1(1). R 3.9 set out a check list of factors to be considered by the court in termining whether, in all the circumstances, time should or should not be extended. One of those factors s whether there was a good explanation for a party's failure to comply with any rule—which was ected in the *Abdelghafar* principles. In *Aziz* it had been argued that the *Abdelghafar* approach ought to be followed because it was stricter than that adopted by the Court of Appeal when considering eals brought out of time. While the court accepted that the *Abdelghafar* approach was stricter, it held t such an approach was acceptable, bearing in mind that the appeal tribunal was a statutory body with ver to regulate its own procedure. The appeal tribunal procedure was not strictly subject to the CPR. It s significant that, whereas the principles underlying the CPR were to some extent incorporated into the ployment Tribunals (Constitution and Rules of Procedure) Regulations 2001 (see, particularly, rule 10), such incorporation was to be found in the Employment Appeal Tribunal (Amendment) Rules 2001. In se circumstances, the advent of the CPR, even if they allowed of any different result, which was ubtful, in no way altered the approach laid down in *Abdelghafar* and *Aziz*. Reliance was then placed on cle 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms—the right to a trial and the right of access to a court. It was submitted that in some way the first instance tribunal ed expeditiously to provide reasons for its decision forming the subject of the appeal and that strict

application of the time limits, subject only to extension in rare and exceptional cases, breached th applicant's article 6 rights. Both those propositions were rejected. The decision presently under appea was delivered orally at the hearing and promulgated with extended reasons 10 days later. There was n delay. The delay on the part of the second tribunal in promulgating its decision was immaterial. Further, strict application of the time limit for appealing did not offend article 6: see, by analogy, the unsuccessfu challenge to the qualifying period for unfair dismissal claims in *Stedman v United Kingdom* (1997 23 EHRR 168.

Driver v Preston Borough Council; 11 June 2002; PA/1090/01
EAT: Judge Peter Clark (as in chambers)

TIME LIMIT

By letter of 18 January 2001 an employee was informed that he was summarily dismissed for gros misconduct. He initiated an internal appeal which was dismissed on 13 March 2001, until which date h was paid as if he were still employed. In subsequent correspondence the employer's solicitors said "Yo were dismissed on 13 March 2001." The employee presented complaints of unfair dismissal and rac discrimination on 4 June 2001. An employment tribunal found that the effective date of dismissal wa 18 January 2001, that the complaint of unfair dismissal had not been presented in time and the tribunal di not have jurisdiction to consider it, and that the complaint of race discrimination had not been presented i time but that time would be extended time in relation to those claims connected with his dismissal.

JUDGE REID QC, allowing an appeal by the employer and dismissing a cross-appeal by the employee said that the terms of the letter of 18 January 2001 were unequivocal. There was no contractual contex which could give rise to even a hint that it did not amount to an immediate dismissal. The events after th dismissal which were more consistent with there having been only a suspension could not alter the fact tha there had been a dismissal. The doctrine of estoppel had no relevance. In the case of a dismissal withou notice the effective date of termination was defined by section 97(1)(b) of the Employment Rights Act 199 as "the date on which termination takes effect". The complaint of unfair dismissal had to be presente within three months of that date under section 111. That date could not be varied by an estoppel arisin from the conduct of one of the parties. It would be possible to pray in aid such matters in support of submission that time should be extended under section 111(2)(b), but it had not be suggested in the presen case that any such matter had been the cause of the application being out of time or had rendered i impracticable to make the complaint in time. Different considerations applied to the race discriminatio claims. The employment tribunal's basis for considering it just and equitable to extend time for th dismissal-related discrimination claim was that there was "an element of ambiguity about his precis relationship with the company in the period to 13 March" and that the employer "was unable to specif any particular detriment to it if the period was extended". It was not clear how the supposed ambiguity i the relationship could have been a basis for extending time. It was not, however, necessary to reach concluded view as to whether that passage indicated an error of law, because there was nothing in th originating application which identified anything that might be an act of discrimination in connection wit the employee's dismissal. The employment tribunal were wrong in principle in allowing an extension c time so that an entirely unparticularised claim could be pursued. The tribunal could only properly hav exercised their discretion to extend time if they could identify the matters which were to be the subject c complaint and, on the material before them, they could not do so.

Highdorn Co Ltd v Saleh; 16 August 2002; EAT/80/02
EAT: Judge Reid QC, Mr D J Jenkins and Mr A E Manners

MENDMENT

After respondent employers had filed a notice of appearance stating that they did not intend to resist the plicant's equal pay claim, accompanied by a letter agreeing she had a claim, they applied, the day before at fixed for the hearing, to amend the notice of appearance to deny liability. The application, opposed by e applicant, was granted by a tribunal chairman by a letter which gave no reasons for his decision. A quest for a review was refused.

WALL J, allowing an appeal by the applicant, said that, while there were clearly differences between an plication to amend an originating application and an application to amend a notice of appearance, the inciples laid down by *Selkent Bus Co Ltd v Moore* [1996] ICR 836 applied to both. For the appeal bunal to interfere with the exercise of a chairman's discretion to permit an amendment, the chairman's cision had to fall foul of the criteria for the exercise of that discretion identified by Mummery J in *lkent*. Under the Employment Tribunals Rules of Procedure 2001 there was no obligation on a chairman give reasons for an interlocutory "decision" such as the one under appeal, but the consequence was that e absence of reasons made it impossible for the appeal tribunal to know what factors had influenced the airman, how he had balanced them and what weight, if any, he had given, in particular, to the fact that e consequences of the amendment might deprive the applicant altogether of her cause of action. Many cisions to allow amendments were purely formal, uncontroversial or minor, and the system could not nction if chairmen were required to give detailed reasons for every interlocutory decision, but the cision in the present case was a considered one. The chairman had quite properly asked the applicant for r response to the application, and she had replied in a full and well reasoned letter. From the applicant's rspective, the absence of reasons meant that she had no idea why she had lost. In a decision as important the proceedings as the present, such an outcome was unsatisfactory. The employers pointed out that ere was no appeal against the refusal of the chairman to review his decision for reasons set out in the usal letter. That did not affect the issue. The appeal concerned the original exercise of the discretion. If at was wrong, the refusal to review must also be wrong. Furthermore, the review decision did not dress the fundamental issue in the case, namely, that by virtue of an amendment which sought to renege an agreement in order to avoid liability and pass it on to a transferor employer, the applicant was placed a position whereby she might have no justifiable cause of action against either employer. Two points om *Skelkent* were directly applicable. The first was the nature of the amendment. It could not have been a more fundamental nature, involving as it did a complete volte face, with the employers reneging on an reement freely entered into, leaving the applicant with no alternative but to apply for the transferor to be ned and the transferor taking the point that the application was out of time. The second point was the lay in making the application to amend. No explanation was given for the employers' radical change of nce. It was fundamental to the exercise of a judicial discretion in a case such as the present that there uld be good reasons advanced for its exercise and that it should only be exercised for good reason. The peal tribunal was in no doubt that, on a proper application of the balancing exercise required by *Selkent*, decision to permit the employers to amend the notice of appearance was plainly wrong. The injustice d hardship involved in granting the amendment was very much greater than that which would have been volved in refusing it. The chairman's decision would be set aside and the matter remitted to a different airman to reconsider the constitution of the proceedings.

Chadwick v Bayer plc; 14 June 2002; EAT/1110/01
EAT: Wall J, Mr P A L Parker and Mr G H Wright

AS

Four of five similar complaints of unfair dismissal were ordered to be heard together, the other being ourned generally. Three cases were withdrawn on the second day of the hearing. The remaining case ceeded. The widow of the applicant whose case had been adjourned later obtained the restoration of complaint. The chairman who had presided at the effective hearing reviewed that decision, sitting alone he pre-hearing review, rejecting a submission on behalf of the applicant's widow that he was likely to be judiced because of his involvement in the earlier case, held that the case did not stand any reasonable nce of succeeding and required payment of a deposit.

JUDGE LEVY QC, allowing an appeal by the applicant's widow, said that the issue on the appeal was ether the chairman had applied the wrong test in deciding whether he should hear the matter. It was mmon ground that the right test was that expressed by Lord Hope of Craighead in *Porter v Magill* 02] 2 WLR 37, para 102, approving Lord Phillips of Worth Matravers MR in *In re Medicaments and lated Classes of Goods (No 2)* [2001] ICR 565, 591, para 85. It was desirable that, where a question of s was raised, those considering the issue should ensure that they were fully familiar with the current te of the law. Looking at the position as it was when the chairman made his decision, there had been a ring with which the chairman had been concerned in which the applicant was not a party but in which

he had featured. The chairman and his colleagues had formed some views as a result of that hearing whi were not necessarily known to counsel representing the present appellant and did not take into accou matters in the applicant's originating application. He expressed strong views in the course of the heari before him of the merits of the case which the appellant was bringing. Furthermore, he was asked to recu himself because of the circumstances. The appeal tribunal was strongly of the opinion that, in the words Lord Phillips MR in *In re Medicaments*, a fair-minded and informed observer would have concluded th there was a real possibility or a real danger that the tribunal was biased. That was sufficient to allow t appeal, though the chairman might have been right in saying that the appellant would have an uph struggle in the employment tribunal.

Attrill (decd) v Wightlink Ltd; 4 July 2002; EAT/1003/01
EAT: Judge Levy QC, Dr D Grieves and Mrs M T Prosser

COSTS WARNING

An applicant complaining of unfair dismissal asserted that she had been employed by the respondent the manageress of a service station since 1993. A preliminary issue was directed to be determined as whether her relationship with the respondent was one of employer/employee and, if so, whether she ha sufficient service to qualify for protection from unfair dismissal. The applicant's case was listed with thr similar cases for a three-day hearing. During the first day, after hearing submissions from counsel for t respondent and from the applicant, who was in person, the tribunal indicated that the applicants faced t risk of an order for costs if they did not withdraw their claims. The applicant said that faced with the thre of substantial costs she could not go ahead, and the tribunal decision was that the application w dismissed on withdrawal by the applicant. The Employment Appeal Tribunal allowed an appeal by t applicant and remitted the case, initially for directions (Recent Points [2002] ICR Part 4).

SCOTT BAKER LJ, dismissing an appeal by the respondent, said that the appeal raised the question whether, and if so in what circumstances, it was appropriate for an employment tribunal to point out to applicant that failure of the claim might lead to an adverse costs order. A tribunal had to be particular careful not to place unfair pressure on a litigant in person and should only make costs warnings such were made in the present case where there was a real risk that an order for costs would be made against unsuccessful applicant at the end of the hearing. The critical question was whether the risk of a costs ord being made against the applicant was sufficiently high to justify the pressure placed on her. His Lordsh had come to the conclusion that the pressure was disproportionate. It was difficult to see how the applica could be said to have acted "otherwise unreasonably" in the sense envisaged by rule 12(1) of t Employment Tribunals Rules of Procedure 1993. The tribunal had ruled that it was not an abuse process to proceed with the employment point and the tribunal was not as a matter of law bound by t decision of an employment tribunal at Liverpool in a similar case. The applicant was entitled to argue th that decision was wrong. On the continuity point she had a respectable argument that there had be continuous employment for the required two-year period. Against that background the costs warning w unfair. It left the applicant in no doubt that if she continued and lost she was at a real risk of a substanti order for costs that might be enforced against her house. She simply could not afford to take the risk. H Lordship agreed with Judge Wakefield's analysis in *Lewis v Kingston-upon-Thames Royal Londo Borough Council* (Recent Points [2001] ICR Part 8). The ultimate question was whether the applicant ha been denied a fair hearing. The danger was that where a tribunal made or pressed a costs warning that w not justified or in a manner that was not justified an applicant would be deprived of a hearing. In the lig of the high threshold that prevailed at the time under rule 12(1) of the 1993 Rules the prospect of any cos order against the applicant, let alone one that placed her house at risk, seemed remote.

SEDLEY and SIMON BROWN LJJ gave concurring judgments.

Gee v Shell UK Ltd; 24 October 2002; [2002] EWCA Civ 1479
CA: Simon Brown, Sedley and Scott Baker LJJ

LISTING

An employment tribunal chairman refused a request by an applicant to postpone or reschedule t hearing of his complaint of race discrimination made on the ground that the fact that it had been set dow for eight days spread over a period of five months prejudiced a fair hearing.

LORD JOHNSTON, on an appeal by the applicant, said that it appeared that the reason for t somewhat unusual scheduling of the hearing was not pressure on the tribunal system, but to comply wi requirements of the parties, particularly the respondents, as far as availability of witnesses was concern to minimise clashing with their professional commitments. Though it was wholly inappropriate for t appeal tribunal to issue any form of instruction as to how the employment tribunal should run its ow affairs and administer its listings, there were one or two observations that could be made. In the first pla the deliberate scheduling of a case whereby there were gaps between every day of a proposed hearing w unsatisfactory and to be avoided unless absolutely necessary. That was because it lent itself to the risk o division between examination and cross-examination of a witness, which was unsatisfactory and n

onducive to good case management. If the gap in time was substantial, it would appear to make it more ifficult for the tribunal to compare examination in chief to cross-examination by way of recollection. But at was not to suggest that any form of intermittent hearing had to be avoided in the sense that all hearings ad to be continuous. Practical difficulties would arise both in relation to the availability of witnesses and e tribunal management if that became an absolute rule. On the other hand, it was extremely important minimise any such time gaps and certainly hearings should be scheduled in any case to allow at least two more days of hearing at any one time even if there had to be a gap. It was not conducive to good practice have a hearing scheduled in the way in which it had been done in the present case, however well ntentioned. Equally, the appeal tribunal was not impressed with the notion that hearings had to be set to ccommodate the professional or other external requirements of either witnesses or parties. An applicant as entitled to a speedy resolution of his case unhampered by the external requirements of the opposite arty. The appeal would be allowed inasmuch that the case would have to be rescheduled in any event, and was to be hoped that the appeal tribunal's observations would be put into practice.

Kumar v University of Strathclyde; 4 July 2002; EAT/3/02
EAT(Sc): Lord Johnston, Mr A J Ramsden and Miss A Martin

RACTICE

An employment tribunal dismissed an employee's complaint of unfair dismissal at the close of the mployee's case on the ground that there was no evidence of any breach of contract by the employers that ould have justified the employee's resignation.

MISS RECORDER SLADE QC, allowing an appeal by the employee and remitting the complaint for ehearing, said that it was not an error of law for an employment tribunal in an appropriate case to onsider of its own motion whether a respondent had a case to answer. The parties might be unrepresented nd unaware of the possibility of making such a submission. The Employment Tribunals Rules of rocedure 1993 and 2001 both conferred on employment tribunals a wide discretion in the conduct of roceedings which enabled a tribunal to consider of its own motion whether there was a case for the espondent to answer. Appropriate cases would occur but rarely and should be considered in accordance ith the principles to be derived from the authorities. *Ridley v GEC Machines Ltd* (1977) 13 ITR 1995 nd *Coral Squash Clubs Ltd v Matthews* [1979] ICR 607 established that the threshold for determining hat there was no case for a respondent to answer was a high one and referred to an approach that the ribunal should reserve the exercise of its discretion to dismiss a case without hearing from the other party or exceptional cases which were "obviously hopeless" or where the party on whom the onus of proof lay ad clearly failed in law or in fact to establish what he had set out to establish. In so far as those authorities ndicated a different approach from that in *Elwick v Kingston Upon Hull County Council* (unreported) 8 October 1994, the appeal tribunal preferred the approach in the earlier cases. It was unlikely, having egard to comments in its decision, that the employment tribunal had applied the high threshold referred to n the guidance to the exercise of the discretion to dismiss a case at "half time" set out in *Ridley* and *Coral quash Clubs*. The tribunal, in deciding to dismiss the claim on the basis that the employee had failed to stablish that he had been dismissed, had erred in law in failing to consider the effect of the acceptance by he employers, stated in their notice of appearance, that the employee had been dismissed by them on 9 April 2000. It was significant that the findings of fact made by the tribunal stopped at 17 April and did ot include the dismissal letter of 19 April or refer to the disciplinary hearing of the same date. An dmission of dismissal in the notice of appearance, at the very least, called for an explanation from the mployers, and the tribunal had erred in law in deciding the case without hearing their case. A respondent ould choose not to call evidence. If that occurred, a tribunal could draw inferences from the material efore it, which in the present case included the minutes of the disciplinary hearing, the dismissal letter and he notice of appearance.

Leach v Flexiprint Ltd; 17 September 2002; EAT/163/01
EAT: Miss Recorder Slade QC, Mr B Gibbs and Ms H Pritcher

AMENDMENT

In his originating application complaining of disability discrimination, an applicant stated: "Despite having had a heart attack and with ongoing heart disease, so having a disability under the Disability Discrimination Act, my employment was terminated without having regard to and contrary to the provisions of the Disability Discrimination Act." Seven months later the employment tribunal allowed the applicant to amend the originating application to complain that he had been unfairly dismissed, holding that it was clear from the originating application that the applicant was claiming that he had been dismissed without good reason and that, therefore, there was a causative link between the originating application, the brief facts stated, and a claim for unfair dismissal.

MR RECORDER LANGSTAFF QC, dismissing an appeal by the respondent employer, said that under the Rules of Procedure then applicable the tribunal had a discretion to permit an amendment without there being an express requirement that any claim sought to be introduced by amendment had to comply with the time limits which would otherwise be applicable if it were brought by way of a separate originating application. The employer submitted, first, that the amendment was not simply a matter of re-labelling the application; it was a completely new claim, and the tribunal had not directed itself specifically by reference to section 111 of the Employment Rights Act 1996, which provided for the time limit applicable to claims of unfair dismissal. It was argued that *Harvey v Port of Tilbury (London) Ltd* [1999] ICR 1034 demonstrated that the essential matter for the tribunal to consider on an application to amend was the time limit that would otherwise be applicable had there been a free-standing application. In *British Newspaper Printing Corpn (North) Ltd v Kelly* [1989] IRLR 222, where it was sought to amend a complaint of redundancy to add unfair dismissal, the Court of Appeal indicated that the tribunal should have asked what relevant hardships would be suffered by the parties if the amendment was, or was not, allowed. The appeal tribunal was bound by that decision and had to reject the submission that the only consideration to which the tribunal should have had regard was the question of the time limits, though they would almost always be an important consideration. The employer urged that the tribunal could not simply identify from the fact of the words "my employment was terminated" that the applicant was complaining about unfair dismissal, still less when he had identified the reason for dismissal as being because of his disability. The test was not whether the appeal tribunal would have regarded the originating application as making a claim of dismissal and of the essential unfairness of that dismissal, but whether the employment tribunal had been entitled to take that view. Taking that approach, although the tribunal might have been benevolent towards the applicant, it had been entitled to regard the words in the originating application as essentially conveying a complaint about dismissal. Where facts were sufficiently identified in an originating application, from which a consequence in terms of compensation might flow if the appropriate legal label was attached, it might be appropriate to focus less on delay and more on potential injustice than if there were little connection between the facts outlined in the originating application and the cause of complaint identified under statute. But the tribunal did have regard to the delay, and the appeal tribunal could not interfere with its exercise of discretion.

Swiss Re Life and Health Ltd v Kay; 11 July 2002; EAT/680/01
EAT: Mr Recorder Langstaff QC, Mr D J Jenkins and Mr P D Wickens

BANKRUPTCY

Following a letter from the trustee in bankruptcy of an applicant who had made a complaint of unfair dismissal saying that he did "not wish to continue the debtor's claim", an employment tribunal made an order dismissing the complaint "on withdrawal by the applicant". Thereupon the applicant wrote to the tribunal saying he wished to continue the proceedings himself, and he received a letter from the trustee saying: "This does not mean that I will stop any action" and advising the applicant to seek legal advice "If you wish to pursue the action in your own name". The matter came before a tribunal on review. The review, which the applicant arrived too late to attend, was refused and the applicant was ordered to pay £500 towards the respondent's costs.

JUDGE REID QC, dismissing an appeal by the applicant, said that it was clear from the context and the letters that the trustee in bankruptcy had not assigned back to the applicant the claim which the applicant had made and which had vested in the trustee on the applicant's bankruptcy, and there was no evidence to support the suggestion that there had at some point been an oral equitable assignment by the trustee in bankruptcy to the applicant of the right to continue the employment tribunal claim. It was then argued that the result of there being a possibility of a remedy which included a compensatory award for injury to feelings was that the cause of action did not vest in the trustee in bankruptcy under the Insolvency Act 1986 and the applicant was therefore in a position to continue his claim. That was incorrect. It might be that, so far as that part of any damages recovered reflected a personal loss in the sense of pain felt in body or mind, such as a claim for libel, the trustee in bankruptcy would not hold that part of the damages, but that did not

nean that the bankrupt had a sufficient interest himself to continue the claim: *Ord v Upton* [2000] Ch 352. he applicant had had no right to carry on with the proceedings at the time of the dismissal of the claim, or ne review. The second question was whether, having refused the review, the tribunal should have made an rder for costs. As well as perversity, it was submitted that, once the cause of action vested in the trustee in ankruptcy, it could not be said that the applicant was a party for the purposes of rule 12 of the mployment Tribunals Rules of Procedure 1993 and that, therefore, there was no power to make an order or costs against him. But, if someone held himself out as a party and made an application asserting that he vas a party, then so far as the proceedings on such an application were concerned he was a party for the urpose of having a costs order made against him. Accordingly, there was jurisdiction to make the order, nd there was nothing in the making of the order which could properly be said to be an improper use of the ribunal's discretion, and the appeal in relation to the costs order of £500 would also be dismissed. Having eceived a warning in fairly strong terms on the preliminary hearing that he was at risk as to costs, the pplicant had chosen to take that risk and it was, therefore, appropriate, given the obvious deficiencies of ne appeal, that an award of costs should be made and he would be required to pay a contribution of 1,500 towards the respondent's costs.

Ellison v Petrie Tucker & Partners Ltd; 19 July 2002; EAT/795/01
EAT: Judge Reid QC, Mr P R A Jacques and Mr A E R Manners

COMPENSATION

An employment tribunal upheld an employee's complaint of unfair dismissal, which was admitted, and claim of breach of contract and dismissed other claims. At a remedies hearing he was awarded £7,417 vith interest up to the date of the decision for breach of contract and £8,745 for unfair dismissal.

LINDSAY J, dismissing appeals by the employee, said that the employee submitted, inter alia, that he ad been prejudiced by details of a without prejudice offer from the employer being improperly laid before he employment tribunal. The employer's solicitors had written to the employment tribunal admitting that he dismissal was unfair and adding that negotiations had taken place at which the employer had agreed to ay £15,364 to the employee. At a subsequent directions hearing the tribunal recorded that the employer vas "prepared to abide by the terms of the draft compromise agreement by a payment of the sum of 15,364". By then there was an open offer by reference to the draft agreement which the employer was ntitled to bring to the tribunal's attention. If the solicitors' letter had said "We agree to pay £15,364", here could have been no possible complaint, but they had then referred back to an earlier offer which had een made without prejudice. However, the only practical effect, if any, of that would be as to costs ncurred between the earlier offer and the later, and in the employment tribunal regime costs did not follow he event and the employer was never in a position to argue that it had been unreasonable of the employee ot to accept its offer. The appeal tribunal failed to see how the employee suffered any relevant prejudice, nd there was nothing improper in a tribunal referring in the course of a remedies decision to an open offer ublicly made. Turning to the employee's claim in respect of loss of accommodation, the employment ribunal found that under the contract of employment the employer was not obliged to provide ccommodation. The appeal tribunal was not convinced that section 123(3) of the Employment Rights ct 1996 enabled compensation to be paid *only* for that to which an applicant was *contractually* entitled. he expression "loss of any benefit which he might reasonably be expected to have had but for the ismissal" appeared not to be restricted to matters to which there had been a contractual requirement or in espect of which some contractual expectation existed. However, quite apart from a finding that the mployee was put to no new expense, a new job, without accommodation, paid almost £9,000 pa more, nd the employment tribunal decided that it was not just and equitable to compensate him for the loss.

Gould v Governors of Haileybury & Imperial Service College; 19 July 2002; EAT/635 & 1191/00
EAT: Lindsay J (President), Mr A D Tuffin and Miss D Whittingham

COMPENSATION

An employment tribunal awarded an applicant compensation for sex discrimination totalling £43,149 n respect of loss of future earnings, injury to feelings, aggravated damages and interest.

MAURICE KAY J, allowing in part an appeal by the employer, said that, in making an award of 15,000 for injury to feelings, the employment tribunal had described the treatment of the applicant as appalling petty conduct which resulted in extreme unhappiness" and placed it as a "moderately severe ase". The correct approach for the appeal tribunal was to ask whether the award was plainly wrong, or utside the permissible bracket, having regard to all the principles set out in *Prison Service v Johnson* 1997] ICR 275 and of what it knew of awards in other cases. Without making light of the injury to the pplicant's feelings, the appeal tribunal had concluded that to quantify the compensation for injury to eelings at £15,000 was plainly wrong and arose from an inappropriate categorisation which had been ver-emphasised as a criterion in any event. The appropriate figure was £10,000. The employment ribunal had reasoned its award of £7,500 as aggravated damages by saying: "The applicant was treated adly and her complaint resulted in a minimal letter from [the principal of the firm]. The applicant was

told that she would be supplied with no reasons for the failure to gain a training contract. She was then given a letter belittling her abilities. When she took tribunal proceedings a monumental amount of effort was put into defending those proceedings. . . . The defence of these proceedings was deliberately designed by the respondents to be intimidatory and cause the maximum unease and distress to the applicant." There was no doubt that aggravated damages could be a legitimate head of compensation, but it was submitted that to award aggravated damages by reference to conduct in the defence of the proceedings would be an unwarranted extension and that there were better ways of dealing with that problem, e g by an order for costs to reflect unreasonableness in the conduct of the proceedings. The problem with that approach was that it was limited to a reflection of costs unreasonably incurred and was unrelated to the victim's "proper feelings of dignity or pride" to use the words of Lord Devlin in *Rookes v Barnard* [1964] AC 1129, 1227. There was no reason in law why aggravated damages should not be awarded by reference to conduct in the defence of proceedings in a discrimination case such as the present, and there was a very good policy reason for allowing such a claim. If a respondent misconducted himself it might amount to victimisation in respect of the protected act of bringing the claim. It would be regrettable if such victimisation could only be compensated by the commencement of further proceedings. It was preferable that where there was misconduct of sufficient gravity it was compensated by the tribunal seised of the matter, which had the feel for the aggravating material and its effect on the victim. The figure of £7,500 was not appealable. It was to be observed that it was not limited to misconduct in the defence of the proceedings but included a reflection of the manner of the discrimination. It was, however, erroneous to award interest on the £7,500 for the whole period from the termination of the applicant's employment, when the misconduct in the defence of the proceedings only arose later, and, taking a broad brush approach and taking account of the reduction in the award for injury to feelings, the interest would be reduced by £502. By way of warning, litigants would be wrong to read the case as giving the green light to claims for aggravated damages in respect of alleged misconduct in the defence of proceedings. Such cases would be few and far between.

Zaiwalla & Co v Walia; 24 July 2002; EAT/827/00
EAT: Maurice Kay J, Dr D Grieves and Mr P R A Jacques

DISABILITY DISCRIMINATION

An employee, a senior benefits assessor, made a complaint that she had been discriminated against in contravention of the Disability Discrimination Act 1995 when she was issued with a final written warning by her employer because of her high level of sickness absence. She contended that to include her absence from work as a result of her disability when considering its incapability procedure for health was less favourable treatment for a reason related to her disability and that the employer should have made an adjustment by excluding that part of her absence. An employment tribunal, dismissing her complaint, found that the employer was justified in taking action in relation to a person who was absent through ill-health and that the employers' treatment of the employee was justified within section 5(1) and (2)(b), rejecting her claim that she came within the phrase in section 6(3)(f) "allowing [a person] to be absent during working hours for . . . treatment" as being a reasonable adjustment for the employer to make.

WALL J, dismissing an appeal by the employee on the preliminary hearing, said that the employee submitted that the tribunal erred in stating that her proposed adjustment was unreasonable in that it would generate ill-feeling and a potential for unauthorised absenteeism to grow and that it was for the tribunal to consider the particular circumstances of the employee's case not the matter in principle. The logical consequences of the argument that an employer should exclude from consideration the entire part of an employee's sickness absence related to disability would be that an employee could be absent throughout the working year without the employer being in a position to take any action in relation to that absence. The tribunal were correct, as a matter of good sense, to take the point that if any such absences were to fall outside the sickness policy it would generate enormous ill-feeling and be a potential for unauthorised absenteeism. In any event, it would not be a practical step for the employer to take. It would severely undermine the scope and range of the sickness procedures and would have a financial impact on the employer and disrupt its activities, in particular its ability to perform its statutory function in relation to housing benefit.

Bray v Camden London Borough Council; 23 July 2002; EAT/1162/01
EAT: Wall J, Mr D J Jenkins and Mrs R A Vickers

DISABILITY

An employment tribunal found, as a preliminary point, that a 29-year-old employee, who had made a complaint of disability discrimination against his employers, suffered from a physical impairment, namely degenerative disc disease, which was more than minor or trivial and that he was disabled for the purposes of the Disability Discrimination Act 1995. In doing so, the tribunal found that cycling, football and playing snooker, particularly for the employee's age group, were normal day-to-day activities and that the employee was unable to perform those activities.

JUDGE REID QC, allowing an appeal by the employers, said that the employment tribunal had expressed the view that, although the Guidance on matters to be taken into account in determining questions relating to the definition of disability excluded specific games and sports, considering "the overwhelming health advice continually given throughout the media, to exclude normal endeavours at fitness from normal day-to-day activities the Guidance inaccurately reflected current society". The Guidance would only be of assistance in what might be described as marginal cases. Clearly the present was such a case and the tribunal were therefore required to take into account the guidance which appeared relevant: see section 3(3) of the 1995 Act. The tribunal had expressly decided to disregard the Guidance on the basis that it did not reflect current society. In doing so, it erred in law. It was for Parliament through the Secretary of State to keep under review the appropriate boundaries of disabilities and not for individual employment tribunals to decide that the existing Guidance no longer reflected current society. Paragraph C3 of the Guidance made it clear that "playing a particular game" was not to be regarded as a normal day-to-day activity, and in its context it was clear that the Guidance was not referring to playing a game to a particularly high level. If a person suffered from such an impairment of their mobility that they were unable to engage in any "normal endeavours at fitness" then the likelihood must be that they were disabled. However, the fact that they were unable to do so by engaging in a particular sport or game did not make that sport or game a "normal day-to-day activity". Assuming as correct, for the sake of argument, that the tribunal's unlikely finding that keeping goal and playing snooker were "normal endeavours at fitness", they were none the less to be disregarded as "normal day-to-day activities" because of the terms of the Guidance. The same applied to cycling. It might be that there was material before the employment tribunal on which they could properly have found that, by reasons of the restrictions on his mobility, the employee was disabled. Unfortunately, on the findings as made in the extended reasons, it was impossible to say whether or not that was the position, and the proper course was to remit the matter to be reheard before a fresh panel.

Coca-Cola Enterprises Ltd v Shergill; 2 September 2002; EAT/3/02
EAT: Judge Reid QC, Mr J C Shrigley and Mr G H Wright

DISABILITY

At a preliminary hearing to determine whether an applicant employee was a disabled person within the meaning of section 1(1) of the Disability Discrimination Act 1995, an employment tribunal heard evidence from a medical expert, instructed jointly by both parties, who concluded that, whereas the employee had had two transient periods of depression which amounted to mental impairment, they had not had a substantial or long-term effect on his day-to-day activities. The tribunal found that during both periods of depression the employee's inability to concentrate at work, and his consequent demotion, amounted to a substantial adverse effect relating to his normal day-to-day activities, that the two episodes were to be linked by reason of section 2(2) of and Schedule 2 to the 1995 Act so as to be treated as having a long-term effect, and that he was a disabled person.

NELSON J, allowing an appeal by the employer, said that the tribunal's reference to Schedule 2 showed that it had been approaching the case on the basis that it was one of past disability. The tribunal's understanding that paragraph 5 of Schedule 2, relating to section 2(2), enabled two instances of the same problem causing a substantial adverse effect to be linked so that they could be treated as having a long-term effect was incorrect. It suggested that the tribunal had not appreciated that past disability must itself have had a substantial and long-term adverse effect. The tribunal's misunderstanding amounted to an error of law. It was not possible to know what influence that error had had on the decision as a whole but it was probable that it had prevented the tribunal from properly analysing the evidence before them. The tribunal had not, for example, examined each period of depression in order to ascertain how long it had lasted. Thus the tribunal had not explained whether by "transient" the tribunal, or the medical expert, meant that the depression was transient within each period of depression or whether it lasted throughout each period, or whether there was a constant underlying state of depression with two islands of symptoms. It was not therefore possible to know whether the first period of depression came within the definition of "long-term" or not. The decision itself did not suggest that the tribunal was intending to find that there was an underlying condition of depression with islands of symptoms; nor was there any clear medical evidence

that there was such an underlying condition. Without such a finding, however, it was difficult to see how the second episode of depression could properly be said to amount to a recurrence of the earlier condition. Though it was for the tribunal to decide whether or not adverse effects were substantial, where, in accordance with his joint instructions, a doctor dealt with the issue of substantial adverse effect and found no such effect, one would expect the tribunal to comment if it was disagreeing with that opinion, unless it was unaware that it was disagreeing. The tribunal had failed properly to analyse the evidence and to explain its decision. The only appropriate course was for the matter to be reheard by a fresh panel.

HSBC Bank plc v Clarkson; 29 October 2002; EAT/205/01
EAT: Nelson J, Mr P M Smith and Mrs R A Vickers

DISCLOSURE

An employee presented an originating application complaining of unfair dismissal and race discrimination, in which he referred to an independent report commissioned by the employer to investigate, inter alia, an allegation by the employee that he had been the subject of bullying. The employment tribunal ordered disclosure of the report.

MAURICE KAY J, dismissing an appeal by the employer, said that the employer first submitted that the employment tribunal had applied the wrong test to the question of whether or not disclosure ought to be ordered and that the correct test was two-stage: first, was the document relevant? If so, second, was its disclosure necessary for the fair disposal of the case? It was said that the employment tribunal had applied a test of relevance alone and had not addressed the further crucial test of necessity. That was not correct. It was clear that the employment tribunal had been convinced that a fair hearing (which was synonymous with the fair disposal of the case) required that the relevant material in the report be disclosed. Although the word "necessary" was not used, the language used was equivalent to the test as the employer had identified it. The second ground of appeal was essentially a perversity argument. The decision to order disclosure had been taken in the light of an appraisal of the contents of the report, which the tribunal had read with the consent of both parties. The employer acknowledged that it was impossible for the appeal tribunal to say that the employment tribunal's assessment of the report was in itself perverse, as the appeal tribunal had not seen the report. That caused the employer to submit that no reasonable tribunal could have ordered disclosure, and that submission was rejected. The third ground of appeal was that the employment tribunal decision included express references to a number of authorities which had not been cited or referred to in the course of the hearing. The propositions included in the decision and based on the authorities were self-evident and incontrovertible. Moreover, the reason for the decision to order disclosure was not to be found in one or more of those propositions but in a different passage. The issue was whether the correct test was applied. In the judgment of the appeal tribunal, the test that was applied was entirely consonant and consistent with the correct test. There was no error in the reference to the authorities. A further point raised by the employer concerned the tribunal's comment that it was "not possible to understand accurately the recommendations and planned actions without reading the findings which gave rise to them" which raised the question as to whether, following its reading of the report, the employment tribunal ought to have invited further submissions on that subject. The answer had to be in the negative. Moreover, only one side would have been in a position to make such submissions as the employee's counsel had not seen the document. It had been suggested that the appeal tribunal might like to give some general guidance, but the circumstances of the present case were highly specific.

Hackney London Borough Council v Joseph; 4 July 2002; EAT/1260/01
EAT: Maurice Kay J, Mr D J Jenkins and Mrs J M Matthias

STRIKING OUT

An applicant's originating application made complaints of sex and race discrimination and breach of contract against both his employers and the employment agency who had placed him with the employers. The applicant, who was from New Zealand, alleged, inter alia, that when he complained to the agency of sexual harassment by his supervisor he was told that as a "traveller" many people in his position had to put up with worse and he should be grateful. The employers wrote to the employment tribunal seeking to strike out the originating application under rule 13(2)(e) of the Employment Tribunals Rules of Procedure 1993 on the ground that the conduct of the proceedings had been scandalous, frivolous or vexatious, citing abusive phone calls from the applicant's fiancee and alleging a vendetta to secure maximum publicity and compensation. The applicant had received no notice of that application when he attended a hearing for "case management" directions which commenced with an application by both respondents to strike out and the production of a 200-page bundle. The chairman granted the application, stating, inaccurately, that the applicant had been forewarned. She found that the race claim had "no potential for success", since "traveller" was not seen as referring to a person from New Zealand and that the only purpose in bringing the case appeared to be vexatious, and, accepting the employers' evidence as to the abusive telephone calls, she found that the proceedings had been conducted in a vexatious and scandalous way.

MRS RECORDER COX QC, allowing an appeal by the applicant, said that it was clear that the pplicant had not had any notice that the strike-out application was going to be made. The chairman had ought to rely on rule 13(3) on the basis that a tribunal was not required to give written notice if the party vas given an opportunity to show cause orally why the order should not be made. No reference, however, o that rule appeared in her decision, because she had proceeded, erroneously, on the basis that the pplicant had been forewarned. In any event, reliance on rule 13(3) was not appropriate where the rounds of the application concerned conduct occurring some time before the application was heard, or ccurring over a period of time. In such circumstances it was important to ensure that a party called on to nswer accusations about such conduct had proper notice and was able properly to prepare to defend imself. The opportunity to show cause orally had to be an adequate opportunity. The applicant could not e said to have had an adequate chance to respond to the application, even allowing for the facts that many f the documents in the bundle had already been disclosed and that the chairman had allowed the pplicant's representative 25 minutes before requiring him to respond. In addition, the chairman had erred n having regard to matters on the tribunal file relating to a dispute between the applicant and the tribunal taff. Accordingly, there had been an improper exercise of the chairman's discretion to proceed to hear the pplication. Turning to the striking out of the racial discrimination claim under rule 13(2)(d), in *Care First Partnership Ltd v Roffey* [2001] ICR 8- the Court of Appeal held that an employment tribunal had had no urisdiction under the 1993 Rules to strike out the applicants' claims at the start of the hearing on the round that they stood no reasonable prospect of success. In *Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting* [2002] ICR 646 the Court of Appeal distinguished ases where there was no reasonable prospect of success from those which were on any footing bound to ail, which could properly be said to be "frivolous" or "vexatious" such as to found jurisdiction to strike ut under rule 13(2)(d). The respondents submitted that the racial discrimination complaint was a claim vhich could properly be said to have no chance whatever of success and was therefore properly struck out. The appeal tribunal did not accept that. The chairman had dealt with the word "traveller" as bearing only ne meaning, namely gipsy. The meaning relied on by the applicant related to Australasian migrant vorkers and was, he maintained, often used to describe workers like himself, working here on temporary obs. The precise words used and their meaning were matters of evidence to be considered at the hearing. As emphasised in *Anyanwu v South Bank Student Union* [2001] ICR 391, discrimination cases should not e struck out save in the plainest and most obvious cases.

Catton v Hudson Shribman; 10 October 2002; EAT/111/01
EAT: Mrs Recorder Cox QC, Ms N Amin and Mr D Chadwick

STRIKING OUT

An employment tribunal ordered an applicant's claims of race and sex discrimination against her employers to be struck out under rule 13(2)(e) of the Employment Tribunals Rules of Procedure 1993 on he ground that the applicant's solicitor's failure to comply with directions for the hearing of preliminary ssues amounted to scandalous conduct of the proceedings.

MR RECORDER BURKE QC, allowing an unopposed appeal by the applicant, said that the pplicant's solicitor had plainly failed in his duty to ensure that the directions were complied with. It was ot sufficient for a solicitor, even a sole practitioner, to say that he had not had enough time to do the work. Though the appeal tribunal would hesitate long before interfering with the exercise by an employment ribunal of its discretion, even apart from making a number of important errors, the employment tribunal ad failed to approach its consideration of whether to exercise the power to strike out under rule 13(2)(e) correctly in law. The starting point had to be whether the conduct of the applicant's case had been scandalous. In *Bennett v Southwark London Borough Council* [2002] ICR 881 the Court of Appeal had addressed precisely that topic and concluded, at para 27, that "scandalous" did not, in the modern world, mean shocking but embraced "two somewhat narrower meanings: one is the misuse of the privilege of legal process in order to vilify others; the other is giving gratuitous insult to the court in the course of such process". That was a direct and binding exposition of the contemporary meaning of "scandalous". Had he tribunal had the judgments in *Bennett* in front of them, they would necessarily have come to a different conclusion as to whether the solicitor's conduct was scandalous within the correct meaning of that word in rule 13(2)(e). The conduct of the applicant's solicitor, however disappointing and open to strong criticism, did not amount to a misuse of the legal process in order to vilify others and did not amount to gratuitous nsult to the court, and the tribunal was wrong in law to conclude that it was scandalous. Furthermore, the ribunal appeared to have proceeded on the basis that the solicitor's conduct was such that it should strike ut by reason of that conduct without consideration of any other matters. Before a tribunal could, as a natter of law, strike out on the basis that there had been scandalous conduct under rule 13(2)(e), or under ts replacement in the 2001 Rules, it had to consider, in addition to the degree of the shortcomings under crutiny, whether a fair trial of the issues was nevertheless possible: *De Keyser v Wilson* [2001] IRLR 324, para 24. In the current context it was essential for a tribunal which was considering a strike-out on the basis of scandalous conduct to consider whether, despite that conduct, a fair trial could nevertheless be achieved and to balance any risk that a fair trial could not be achieved against the seriousness of the conduct under examination. If the tribunal had asked itself that question there could only have been one

answer, namely that a fair trial was possible. Further, *Bennett* also decided that, before striking out in th face of scandalous conduct, a tribunal had to consider whether striking out was a proportionate respons to the conduct. Though it was possible that that part of the decision in *Bennett* was obiter, it appeared to be plainly right, and the tribunal in the present case had not considered proportionality at all.

Ogunleye v Greater Manchester Probation Committee; 2 September 2002; EAT/817/01
EAT: Mr Recorder Burke QC, Ms K Bilgan and Mrs A Gallico

MPLOYMENT TRIBUNAL

By a majority decision, an employment tribunal dismissed an employee's claim of indirect sex scrimination on the ground that the employers' refusal to allow her to return to part-time working after e birth of her child was justified within the meaning of section 1(1)(b)(ii) of the Sex Discrimination Act 975.

JUDGE PETER CLARK, allowing an appeal by the employee, said that the correct approach to the uestion of justification for the purposes of section 1(1)(b)(ii) was set out in *University of Manchester v ones* [1993] ICR 474, 497–498, and *Allonby v Accrington and Rossendale College* [2001] ICR 1189, 201, para 29. The employment tribunal's reasons did not demonstrate that it had adopted that approach. irst, there was nothing to indicate that the tribunal had considered the quantitative and qualitative effect f the requirement for full-time legal secretaries in the employers' personal injuries department on women ffected by it. That was a pre-requisite for the necessary balancing exercise, taking into account also the eeds of the employers which were, by contrast, fully set out in the tribunal's reasons. Secondly, no ttempt was made to explain how the minority member reached his or her dissenting opinion. The appeal ibunal would adopt the words of Phillips J in *Parkers Bakeries Ltd v Palmer* [1977] IRLR 215, para 11: where there is a majority decision it is very desirable that the views of the majority and those of the inority should be set out clearly and distinctly in separate paragraphs. Unless that is done neither the arties nor the appeal tribunal can really get a clear idea of precisely what are the views of the majority and inority respectively." *Palmer* was a comparatively straightforward unfair dismissal case. The desirability f the majority and minority views being clearly and fully expressed in the tribunal's reasons was, if nything, greater in a case such as the present where the tribunal was required to carry out a careful alancing exercise between the extent of the detriment to employees on the one hand and the needs of the nployers' business on the other. The decision would be set aside and the whole case remitted to a fresh ibunal for rehearing.

Fox v Betesh Fox & Co Solicitors; 7 October 2002; EAT/363/01
EAT: Judge Peter Clark, Ms G Mills and Mr J C Shrigley

MPLOYMENT TRIBUNAL

After an eight-day hearing an employment tribunal dismissed an employee's complaints of, inter alia, ce discrimination and unfair dismissal.

JUDGE SEROTA QC, dismissing an appeal by the employee made on the ground, inter alia, that he had en denied a fair hearing because the tribunal chairman had repeatedly fallen asleep during the course of e hearing, said that the employee had made nine specific allegations before the employment tribunal hich, with the exception of one, had been set out in the extended reasons, investigated and rejected on the cts. There was no evidence to justify the suggestion that the employment tribunal had misconstrued the vidence. It had correctly directed itself and made findings which could not be disturbed on appeal. The pplicant had suggested that the chairman was asleep during some of the evidence of one witness, but it as apparent that the chairman had made a note of that evidence. The employee's representative said that e had been embarrassed to raise the question of the chairman dozing off as he was unwilling to prejudice s client's case by upsetting the chairman, and he sought to distinguish *Red Bank Manufacturing Co Ltd v leadows* [1992] ICR 204 on the grounds that the conduct there was that of a lay member, not the hairman, and that the member had been questioned at the time and given an explanation. However, those atters formed no distinction at all. It was quite wrong, if the employee was correct, that the chairman's nduct should have extended throughout the eight days of the hearing without any complaint being made the tribunal. A litigant could not be permitted to allow conduct such as that alleged to continue on the asis that, if the decision was in his favour, he would take no action, but that there was a ground of appeal the decision should go against him. If an advocate in an employment tribunal considered a member of ie tribunal was dozing or failing to attend, he had a duty to draw that to the attention of other advocates nd to raise it with the chairman at once. The duty of an advocate to a client, and to the tribunal, had to revail over any personal embarrassment. If the conduct complained of was seen by both advocates, the uestion of embarrassment should not arise. If the matter was raised at the time it could be dealt with ppropriately by the tribunal, and, if there was substance in the complaint, the employment tribunal might ave to order a rehearing. Unless matters such as were complained of in the present case were raised at the me, as Tucker J made clear in *Red Bank Manufacturing Co Ltd v Meadows*, they would not be ntertained by the appeal tribunal.

Mayers v Corporation of London; 10 December 2002; EAT/812/00
EAT: Judge Serota QC, Miss C Holroyd and Mr A D Tuffin

EQUAL PAY

Women hostel workers employed by a city council applied for equality of pay with three male workers employed by the council at another hostel. An employment tribunal directed that a material factor defence under section 1(3) of the Equal Pay Act 1970, raised by the council, should be taken as a preliminary issue and that issue was determined against the council.

JUDGE PETER CLARK, allowing an appeal by the council, said that on the face of section 1(3) the material factor defence differed depending on whether the claim for equal pay was based on like work or work of equal value. In the former case (section 1(3)(a)) there *had to be* a material difference between the woman's case and the man's. In the latter (section 1(3)(b)) there *might be* a material difference. It followed that a necessary pre-condition to determining whether the section 1(3) defence was made out was to decide whether the applicant's case was properly based on like work or work of equal value. The present case provided an example of a point which ought not to have been taken as a preliminary issue. The appeal tribunal would proceed on the assumption that the case was a like work case, since below the council had accepted that the relevant test was that adumbrated in *Glasgow City Council v Marshall* [2000] ICR 196, applying *Strathclyde Regional Council v Wallace* [1998] ICR 205, which were both like work cases. Applying the guidance in those cases, the test for an employer seeking to establish the section 1(3)(a) defence was: (1) was the employer's explanation or reason for the difference in pay genuine and not a sham? (2) Was the less favourable treatment of the applicant due to that reason? The factor had to be significant and relevant. (3) The reason must not be the difference of sex. (4) In a like work case the factor relied on had to be a significant and relevant difference between the woman's case and the man's case. The employment tribunal had answered the first three questions adverse to the council and made no finding on the fourth question. In relation to the first question, the appeal tribunal had carefully considered the tribunal's reasons but were unable to discern what it was about the council's reasons, good bad or indifferent, that was said to be other than genuine. The second question raised an issue of causation. Justification was irrelevant at that stage, and the tribunal had fallen into error in considering the question of justification at the causation stage. On the third question, it was for the tribunal to determine whether in fact a disproportionate impact on women amounting to prima facie indirect sex discrimination was present in the difference in treatment and, if so, to determine whether the council had justified the less favourable treatment; alternatively, whether the less favourable treatment was directly discriminatory, in which case the question of justification also arose in the context of equal pay. Neither question had been addressed by the tribunal. Accordingly, the tribunal's reasoning that the material factor defence had not been made out could not stand.

Carlisle City Council v Bulman; 2 December 2002; EAT/1120/01
EAT: Judge Peter Clark, Mr P A L Parker and Mr S M Springer

ESTOPPEL

A local authority employee was summarily dismissed for gross misconduct following the application of a new disciplinary procedure. Under the old procedure he would have been entitled to a hearing by councillors; and, on a complaint of unfair dismissal by the employee, an employment tribunal found that the council had had no right to impose the new procedure, that failure to provide a hearing by councillors would be a fundamental defect which might well have affected the result, but that the employee was estopped from relying on the old procedure. The tribunal found that the dismissal was fair and dismissed the complaint.

JUDGE PETER CLARK, allowing an appeal by the employee, said that for the equitable doctrine of estoppel to operate there had to be a legal relationship giving rise to rights and duties between the parties; a promise or a representation by one party that he would not enforce against the other his strict legal rights arising out of the relationship; an intention on the part of the former that the latter would rely on the representation; and such reliance by the latter party. In the present case the necessary legal relationship existed. Had the employee promised or represented that he would not enforce his strict legal rights against the council in the form of the old procedure, it being common ground that he had not agreed to the new procedure, intending the council to rely on that representation? The representation did not need to be express but it had to be clear and unequivocal. Further, it had in some way to have influenced the conduct of the council. It was not correct to say, on the undisputed evidence, as did the tribunal in their reasons, that at no point had the employee's advisers challenged the application of the new procedure. Although their challenges had not been directed specifically at the procedure as a matter of contract, it was absolutely clear that the employee was not silent on the matter and had protested. The tribunal had erred in so far as they implicitly found that the employee had made a clear and unequivocal representation to the council that he would not seek to rely on his contractual right to the old procedure. Further, there was no evidence before the tribunal that the council had acted in reliance on any representation made by the employee. Accordingly, the tribunal had fallen into error in finding that the employee was estopped from relying on the old procedure, and the case would be remitted for rehearing before a different tribunal.

Lee v Bristol City Council; 30 October 2002; EAT/536/01
EAT: Judge Peter Clark, Mr C Edwards and Mrs J M Matthias

MISCONDUCT

An employee accused of bullying and intimidation was refused the opportunity to cross-examine the makers of statements against her. The employer's panel conducting the disciplinary hearing read the statements, which the employee claimed were "a pack of lies" the makers had been coerced into making. The panel adjourned the hearing and saw the witnesses, who confirmed their statements and denied that they had been coerced. The panel formed the view that the witnesses were terrified of the applicant and that she was guilty of gross misconduct. She was dismissed and her complaint of unfair dismissal was rejected by a majority of the employment tribunal.

WALL J, dismissing an appeal by the employee, said that the function of cross-examination in the forensic context of civil proceedings was to test the credibility of witnesses as part of a fair hearing in which each party's case was put to the other, with the object of the tribunal deciding, on the balance of probabilities, who was telling the truth and what, factually, occurred. Section 98 of the Employment Rights Act 1996 did not require a dismissing employer to be satisfied that the employee whose conduct was questioned had actually done what he was alleged to have done. It was sufficient for the employer to have a genuine belief that the employee had behaved in the manner alleged, to have reasonable grounds for that belief and to have conducted an investigation which was fair and proportionate to the employer's capacity and resources. The employer had to act fairly but fairness did not require a forensic or quasi-judicial investigation. To a lawyer, cross-examination designed to undermine credibility would appear the natural way of testing whether witnesses were telling the truth, but it did not follow that an employer was bound to take the same course. The question for a tribunal hearing an unfair dismissal claim was whether in all the circumstances the investigation as a whole was fair. There was no rule of law that rendered it incumbent on an employer to arrange a hearing which gave the employee the opportunity to cross-examine the person making a complaint: *Ulsterbus v Henderson* [1989] IRLR 251, para 21, though that case did not lay down that cross-examination could never be required in any investigation carried out by a reasonable employer. The question in each case was whether the employer fulfilled the test in *British Home Stores Ltd v Burchell* [1980] ICR 303, and it was for the employment tribunal to decide whether the employer had acted reasonably and whether the process had been fair. In the instant case the tribunal had directed itself appropriately within the framework of section 98(4) and the conclusions of the majority could not be challenged. It was, however, unfortunate that the employer did not give reasons for its refusal to allow the employee to cross-examine the complainants. It was also unfortunate that the disciplinary panel, when they re-interviewed the complainants, did not put to them all the matters raised by the employee at the disciplinary hearing. A different employer might have taken the view that fairness required cross-examination of the witnesses, but the procedure adopted by the employer in the instant case was within the band of reasonable options.

Santamera v Express Cargo Forwarding (t/a IEC Ltd); 26 November 2002; EAT/780/01
EAT: Wall J, Lord Davies of Coity and Mr D J Hodgkins

PRACTICE

An applicant employee's complaint of unfair dismissal was adjourned at his request for health reasons and was re-listed. Six days before the new date the applicant requested a further adjournment, claiming that he had only then heard of the re-listed hearing. The adjournment was refused, though the applicant was told that if the employment tribunal were satisfied that he had not received the notice of hearing the case would be postponed. The applicant did not attend the hearing, and the tribunal dismissed the claim under rule 9(3) of the Employment Tribunals Rules of Procedure 1993 "for his non attendance".

MS RECORDER SLADE QC, allowing an appeal by the applicant, said that rule 9(3) gave an employment tribunal a discretion to dismiss or dispose of a case in the absence of a party, but, before exercising that discretion, the tribunal had to consider the material produced by the party who was absent. That consideration was material to the exercise of the discretion and also to the decision as to what was to be done on any disposal. In the present case the tribunal had before it a claim for unfair dismissal. The dismissal was admitted and in those circumstances the burden of proof was on the respondent employer to establish the reason for dismissal and to show that it was an admissible reason. Thereafter the inquiry as to whether the dismissal was fair attracted no burden of proof on either party but was a matter to be decided by the tribunal on the evidence before it. In the judgment of the majority of the appeal tribunal, the employment tribunal did not give adequate reasons for its decision to take the course of dismissing the originating application. The reasons for so doing, such as they were, indicated that the reason for taking that course was the non appearance of the applicant. While the reasons recorded that the originating application had been considered, they gave no indication as to why, having considered the originating application and other documentation, the tribunal considered it appropriate to adopt the course of dismissing the application without disposing of it by other means such as inviting the employer to lead its evidence and make submissions. The documentation referred to by the tribunal did not provide an obvious answer as to why the application should be dismissed. The requirement in rule 9(3) for "due consideration" was a statutory pre-condition to the exercise of the discretion and, since the requirement

was there in the rule, proper consideration had to be given to the documents there referred to. The cas would be remitted to a different tribunal for hearing.

Roberts v Skelmersdale College; 25 September 2002; EAT/1094/01
EAT: Ms Recorder Slade QC, Mr D Smith and Mr P M Smith

COMPENSATION

An employment tribunal upheld an employee's complaint of unfair dismissal, following a failure to consult her during a reorganisation when she was made redundant, but awarded no compensation on the ground that she would have been dismissed in any event.

JUDGE McMULLEN QC, allowing an appeal by the employee and remitting the issue of remedy, said that it was clear that at the hearing and in written submissions no one had directly turned their attention to the *Polkey* process and that no opportunity was given for the employee to argue against the 100% reduction of her compensation, though the tribunal did have evidence on which it could come to a conclusion. The evidence before the tribunal included an appendix to the applicant's witness statement which set out a comparison between her past experience and her suitability for a newly created post and the employee's initial application to the employers in which she indicated her experience. The employee contended that, in the light of that evidence, it was perverse of the employment tribunal to find that it was the employers' bona fide and reasonable conclusion that the employee did not meet the relevant criteria for the new post. Since the objective standard was imported by the word "reasonable" it was possible for the appeal tribunal to examine the materials put before the employers and then before the tribunal. Given that the appeal tribunal had seen that the employee had relevant experience, it was not correct for the employment tribunal to draw the conclusion that the employers had reasonable grounds for the conclusion that she did not, and the employee's appeal was, accordingly, well founded. The real problem had occurred in the assessment thereafter based on that finding of the employee's chance of surviving in the employers' organisation. The approach taken by the tribunal, not expressly on *Polkey* but on a *Polkey* approach, had been taken without any submissions. There would be some situations where one could say that what had gone wrong was merely "procedural", and others where one could say that an employee had been deprived of something of "substantive" importance, to use the phrase of Lord Coulsfield in *King v Eaton Ltd (No 2)* [1998] IRLR 686. While in many cases it might be inappropriate to allocate the facts to either category, the distinction would often be of some practical use in considering whether it was realistic to embark on an attempt to construct the hypothesis enabling one to assess what would have happened. If the lapse was merely procedural it might be relatively straightforward to envisage the course of events, whereas it might well be more difficult if what had gone wrong was more fundamental. In *O'Dea v ISC Chemicals Ltd* [1996] ICR 222, 234–235, the Court of Appeal was critical of the distinction drawn between "substantive" and "procedural". The Court of Session in *King*, while not expressly departing from it, appeared to have adopted as helpful the distinction which it set out in para 19. The appeal tribunal would follow the later Scottish case.

Donovan v Centrepoint Soho; 17 October 2002; EAT/1172/01
EAT: Judge McMullen QC, Mr K Edmondson and Miss D Whittingham

DISCLOSURE

An employment tribunal chairman refused an application by two applicant employees for an interlocutory order for the production of documents under rule 4(5)(a) of the Employment Tribunals Rules of Procedure 2001, in relation to their unfair dismissal complaints, on the ground that the documents sought were unlikely to be relevant. The chairman refused to reconsider his decision and the employees requested extended reasons for the purpose of an appeal. Without providing reasons, a full tribunal, of its own motion, reconsidered the employees' application and, under rule 4(5)(a) and (b), required the employers to allow inspection of a number of documents.

BURTON J (President), allowing an appeal by the employers, said that there was no automatic power to review any order of a tribunal. If every order of any kind could be reviewed, employment tribunals would never be able to go forward. An order which was, in effect, a requirement under rule 4(5)(a) was not the kind of order which was the subject matter of review under rule 13. That was not to say that such an application for discovery or inspection could not be renewed, once having been refused, but the ordinary principles requiring some fresh circumstances would be required; a review was not available. In so far as the employment tribunal, in response to the request for extended reasons, had simply listed the original application once again and looked at it again, albeit with a full tribunal rather than a chairman alone, there was no power or jurisdiction to do so. The situation was, however, different so far as concerned rule 4(5)(b). There had been no previous application under rule 4(5)(b) for disclosure and inspection before the hearing. The decision under rule 4(5)(b) was one made by the tribunal of its own motion and was one for which there was, on the face of it, jurisdiction. It was submitted that the way in which the jurisdiction and power under rule 4(5)(b) should be exercised by a tribunal was by reference to rule 31 of the Civil Procedure Rules and the Practice Direction thereunder; that that required that no such order should be made without specific evidence in support; and that in the present case there was no such evidence. It appeared to the appeal tribunal that what was meant by the reference to CPR r 31 was simply

to refer to the power and jurisdiction to make such orders, for example, for standard discovery and for specific discovery as described in the CPR and not to the procedures laid down in the Practice Directions which were not referred to. In any event, the power in question was a power of the tribunal to make an order of its own motion, not on the back of an application that was or could have been supported by witness statements. Nevertheless, in making an order, even of its own motion, a tribunal would want and need to pay regard, not only to the well established practice in the High Court, but also to the overriding objective set out for employment tribunals in regulation 10 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001. It would, therefore, need to be satisfied that the documents were squarely relevant and that what was being sought was both relevant and proportionate. What had been ordered in the present case was not proportionate. Further, in the present case the order should have been not for inspection but for disclosure. However, in the ordinary case, once disclosure had been made, inspection ought to follow as a matter of course, and contested applications for inspection after an order for disclosure should be rare in the extreme and carried out at risk as to costs in respect of parties taking an inappropriate objection to inspection. It was open to the applicant to make a fresh application under rule 4(5)(b) supported by an appropriate statement and seeking much more particularised documents.

Ken Read & Son Ltd v Dawson; 11 November 2002; EAT/287/02
EAT: Burton J (President), Mr D A C Lambert and Mrs R A Vickers

MISCONDUCT

An employee who was dismissed for accessing pornography on the internet at work using the computer with which he was provided had his complaint of unfair dismissal upheld by an employment tribunal.

MISS RECORDER SLADE QC, allowing an appeal by the employer, said that the tribunal found that the employer had a genuine belief in the misconduct, that that belief was founded on reasonable grounds and that a reasonable investigation had been carried out by the employer. While it had set out the correct approach to the question of whether the dismissal was fair in all the circumstances, the tribunal had, nonetheless, considered for itself whether the conduct should be categorised as misconduct or gross misconduct and approached the question of the fairness of the dismissal by considering what it considered to be the proper categorisation rather than by considering whether the employer's categorisation of the conduct as gross misconduct was within the band of reasonable responses. The tribunal was faced with a claim about which the facts were not in dispute. The tribunal had found that the constituent requirements as set out in *British Home Stores Ltd v Burchell* [1980] ICR 303 were made out, and the only judgment it had to make was whether the sanction of dismissal was within the band of reasonable responses of the reasonable employer. If a correct approach had been adopted, no reasonable employment tribunal would have come to a conclusion other than that dismissal was within the band of reasonable responses of the employer.

Hillingdon London Borough Council v Thomas; 26 September 2002; EAT/1317/01
EAT: Miss Recorder Slade QC, Mr R Thomson and Mr P D Wickens

PRACTICE

An applicant and her solicitor failed to attend an interlocutory hearing before a tribunal chairman at which directions for the future conduct of her complaint of disability discrimination were given and a hearing date fixed. On receiving the directions order, the applicant's solicitor requested a review on the ground that they had not received notice of the directions hearing and that the applicant's medical expert was not available on the date fixed. The chairman refused to relist the case for further directions on the basis that the notice of hearing had been properly sent.

JUDGE PETER CLARK, allowing an appeal by the applicant, said that the critical question, never addressed by the chairman, was whether the applicant's solicitor had received notice of the directions hearing. While it was correct to say that a notice of hearing properly sent was deemed to be good service, that presumption might be rebutted where the contrary was proved by the deemed recipient. In the case of a decision (as opposed to an order) the decision would be reviewed if the outcome was proved: see *Zietsman (trading as Berkshire Orthodontics) v Stubbington* [2002] ICR 249 and the cases there cited. The same principle applied where it was sought to have an order of the tribunal, not a decision, altered, varied or revoked. The applicant's solicitor had given evidence on oath that his firm had not received the notice of hearing. Accepting that evidence, the applicant's solicitor had not attended the directions hearing because he had not received notice of it, and in his absence there was no agreement as to the hearing dates fixed by the chairman. Had he attended he would have ensured that the dates fixed were dates on which the applicant's medical expert would have been available. The error on the part of the chairman was in not inquiring into the applicant's representative's contention that he had not in fact received notice of the directions hearing.

Mackintosh v Anchor Trust; 4 December 2002; EAT/1121/02
EAT: Judge Peter Clark

STRIKING OUT

An employment tribunal ordered an employee's originating application, complaining of unfair dismissal and race discrimination, to be struck out under rule 13(2)(e) of the Employment Tribunals Rules of Procedure 1993 on the ground that the manner in which the proceedings had been conducted on her behalf had been scandalous, frivolous or vexatious following, inter alia, interventions by her lay representative when the employee was being cross-examined.

WALL J, dismissing an appeal by the employee, said that the absolute right to be represented by the individual of their choice was one of the well established rights which applicants enjoyed as part of their wider right to free access to employment tribunals. In *Bache v Essex County Council* [2000] ICR 313, the Court of Appeal clearly enunciated the rule that the right to a representative of choice was an unqualified right and was not therefore affected by regulations designed to ensure that the tribunal had power to control its own proceedings. Where an applicant before the tribunal was represented by a person who did not belong to any professional body and that person misbehaved, the tribunal's powers in relation to the individual concerned were limited. There was no professional sanction that could be invoked. There was no body to whom the offending representative could be reported. The applicant had an absolute right to be represented by the person concerned. Regrettably, therefore, if repeated warnings about the manner in which the proceedings were being conducted had no effect, the only sanction the tribunal had was the ultimate one of striking out the applicant's claim. A tribunal's reluctance to take that course was self evidently understandable. It meant that the case was not heard on its merits. The applicant might have an arguable case which was entirely obscured, and its presentation frustrated, by the manner in which it was conducted by the applicant's representative. It was for that reason that an originating application should only be struck out, under what was now rule 15(2)(d) of the Employment Tribunals Rules of Procedure 2001, if the manner in which the proceedings were being conducted on the applicant's behalf made it impossible for the tribunal to do justice between the parties. The employment tribunal had not had the advantage of the guidance given by *Bennett v Southwark London Borough Council* [2002] ICR 881, which had not been heard by the Court of Appeal until a year later, but its approach had been entirely consistent with the judgment of Sedley LJ at p 891, paras 26–29. The tribunal had been right to allow the employee an opportunity to dispense with the services of her representative. She had declined to do so. She must have been aware of the consequences of her action. The appeal tribunal were in no doubt that the employment tribunal was entitled to come to the view that the behaviour of the applicant's representative had rendered a fair assessment of the employee and her case impossible. The strike out was a regrettable but entirely proportionate response.

Edmondson v BMI Healthcare; 26 November 2002; EAT/654/01
EAT: Wall J, Mrs J M Matthias and Mrs M T Prosser

TIME LIMIT

The Registrar of the Employment Appeal Tribunal refused an application by an applicant for an extension of time for appealing against a decision of an employment tribunal dismissing his complaint of unfair dismissal, where his notice of appeal had arrived from counsel by fax at the appeal tribunal just over one hour after midnight on the last day for entering it.

JUDGE PETER CLARK, dismissing an appeal by the applicant, said that in *Abdelghafar v United Arab Emirates* [1995] ICR 65, 69E, it was said that an appeal against the Registrar's refusal to extend time was conducted as a rehearing of the original application. In CPR r 52.11 the approach to be adopted in the civil courts was to conduct appeals by way of review rather than a rehearing. The applicant submitted that there was no warrant for extending that rule to the present statutory tribunal. The employer, while content to adopt the view that a review was appropriate, had been careful to invite the appeal tribunal, in the alternative, to exercise its own discretion in accordance with the practice in *Abdelghafar*. Treating the matter as a review, the Registrar's exercise of discretion had not been shown to be wrong in law. More particularly, considering the arguments on the merits de novo would produce the same conclusion as the Registrar. While the degree of delay in lodging an appeal was a relevant factor, it was far from determinative. It was not an acceptable reason for delay that the applicant did not receive the extended reasons until five weeks as opposed to six weeks before the time for appealing expired. The point was taken that there was delay in the applicant's legal insurer's taxation specialist releasing the papers. It was essential that the applicant's solicitor, if she was not to draft and lodge a notice of appeal herself, should have obtained the papers from the taxation specialist and obtained authority from the insurer, at any rate, to lodge an appeal. That was all left to the last minute and counsel was not instructed until two working days before expiry of the limitation period. The cases had long counselled appellants and their advisers not to wait until the last moment in case there was some delay, normally in the context of postal delays, but there could be added the possibility of delays in getting through with a facsimile transmission. The applicant referred to the merits of the appeal. It was not a hopeless appeal, which would be a relevant factor in favour of the respondent employer; but nor did the grounds of appeal raise a strong unanswerable appeal. In those circumstances, as the Registrar (no doubt taking into account the guidance in *Abdelghafar*) concluded, the merits were of little significance in the overall picture. A further matter was that a member of the appeal tribunal staff had indicated that applications for an extension of time should

be made with the notice of appeal: see the amended rule 37(4) of the Employment Appeal Tribunal Rules 1993. That amendment did not appear, of itself, to overrule the guidance in *Abdelghafar*, at p 71F. Whether or not an application for an extension of time could be made and granted before the expiry of the limitation period for appealing, it seemed on the facts of the present case that the application was all of a piece with the last minute approach by the applicant's advisers. Had an application been made earlier and not dealt with, the point might have had some force, but made, as it was, the day before time expired did not materially alter the overall conclusion that no good excuse had been made out for an extension of time.

Stratford v West Lancashire District Council; 18 October 2002; PA/276/02
EAT: Judge Peter Clark (as in chambers)

PPEAL

On an appeal by an employer from an employment tribunal decision upholding claims by an employee r pay in lieu of notice and holiday pay, the employer sought to raise for the first time that the claims were ıt of time.

JUDGE ALTMAN, allowing the appeal, said that it was never argued before the employment tribunal, ıd that tribunal had not considered, whether the claims were out of time and, if so, whether it was asonably practicable for them to have been made in time and, if not, what the reasonable period would e. There was a very well established body of judicial authority that the appeal tribunal should not ıtertain a point of law taken for the first time and not taken before the employment tribunal. The present se, however, concerned the exception to that principle, where what was being dealt with was an issue as jurisdiction. The Employment Rights Act 1996 made clear that the employment tribunal did not have risdiction to entertain a claim unless it was brought within a specified time or, if it was not reasonably acticable, within such other time as might be considered appropriate. Accordingly, the appeal raised an sue of jurisdiction, and it was right that the point should now be taken. The employee's claims for pay in u of notice and holiday pay would be remitted to a fresh tribunal to determine whether they had been esented within three months of the effective date of termination of his employment and, if not, whether it d been reasonably practicable to do so.

Landon v Lill; 14 November 2002; EAT/1486/00
EAT: Judge Altman, Mr T Haywood and Mr D J Jenkins

ONSTRUCTIVE DISMISSAL

An employee resigned following the rejection of his grievance about his annual appraisal and a decision his employer to remove him from consideration for work in Australia. He made a complaint of unfair smissal, submitting that there had been a breach of the fundamental term relating to trust and confidence the low appraisal, the withdrawal of the consideration of him for Australia and the failure to investigate operly his grievance relating to those two matters. Dismissing his complaint of unfair dismissal on the ound that there had been no dismissal, an employment tribunal found that the failure to consider the ıployee for Australia had been based on the employer's interpretation of four incidents touching on the ıployee's attitude, including aggressive behaviour at a meeting, and that the employer's investigation had vered all those directly involved in the incidents and was fair.

JUDGE McMULLEN QC, dismissing an appeal by the employee, said that an employee was entitled access to a grievance procedure: see *Goold v McConnell* [1995] IRLR 516, but what was seen at the ne as a radical approach by the appeal tribunal had quite limited scope. In the present case, none of the ticisms made by the appeal tribunal *Goold* applied. There was a grievance procedure, it was activated, was prompt, it was the subject of an appeal. The criticism was of the employer's judgment as to the iousness of the incidents and of the quality of the employer's investigation. The standard against which vestigation should be judged was, in the present case at least, the band of reasonable responses. The urt of Appeal had recently reaffirmed in *J Sainsbury plc v Hitt* [2003] ICR 111 that the band of asonable responses approach applied to the conduct of investigations as much as to other procedural and bstantive aspects of a decision to dismiss for conduct. That seemed to represent a slight lowering of the ndards of fairness in an investigation of a disciplinary matter. Judged against the standards of a asonable employer, could it be said that no reasonable employment tribunal could have found that the lure to investigate every single person at the meeting constituted a breach of the standards required of a asonable employer, such breach being of a fundamental nature entitling the employee to leave thwith? The criticisms made by the employee of the investigation by the employer fell well below that ndard. The employment tribunal had been fully alert to the employee's criticism and balanced the guments, and it had acquitted the employer in strong terms. There was no finding critical of the ıployee's evidence or favourable to the employer's evidence which was not supported by reasons. The bunal had then concluded that there was "no basis for asserting or alleging that the grievance procedure a whole was anything other than fair, detailed and thorough". The tribunal had set out its reasoning rfectly adequately for that decision. It would be noted that, applying *J Sainsbury plc v Hitt*, that seemed be a higher standard than was required. Nevertheless, the tribunal had accepted that the employer met ıt very high standard and it followed that it would have done so at the lower standard which was plicable.

Hamilton v Tandberg Television Ltd; 12 December 2002; EAT/65/02
EAT: Judge McMullen QC, Mrs R Chapman and Mr M Clancy

CONSTRUCTIVE DISMISSAL

Following allegations of, inter alia, drunkenness, made by the managers of a public house, an employee went on sick leave and invoked his employers' grievance procedure. Believing that his employers were failing to deal with his grievance properly, the employee resigned. He made complaints of unfair dismissal and breach of contract. An employment tribunal found that, though the managers' conduct amounted to a fundamental breach of the implied term of mutual trust and confidence, the employee had not resigned in response to that breach and it dismissed his unfair dismissal complaint. The employment tribunal also found that, by failing to pay him sick pay and holiday pay and by changing his pay day, the employers were in breach of the contract of employment, but it did not consider the cumulative effect of those breaches in relation to the employee's claim that he had been constructively dismissed.

JUDGE McMULLEN QC, allowing an appeal by the employee, said that it was submitted, inter alia, that the employment tribunal had erred in law in that there was no direction on the "last straw" doctrine as enunciated by Glidewell LJ in *Lewis v Motorworld Garages Ltd* [1986] ICR 157, 169: "The breach of this implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. In particular in such a case the last action of the employer which leads to the employee leaving need not itself be a breach of contract; the question is, does the cumulative series of acts taken together amount to a breach of the implied term?" The employee further criticised the employment tribunal's decision in that it compartmentalised the claims for breaches of contract on the one hand and the dismissal claim on the other, when, in truth, they were interconnected, and he submitted that there was a failure to consider the final straw and the accumulation of grievances together. In the judgment of the appeal tribunal, the employment tribunal had made decisions about each individual aspect and considered only whether each amounted to a breach of contract. It had erred in failing to apply the more flexible approach enjoined by Glidewell LJ, which was to look at matters beyond simply breaches in order to determine whether there was a cumulation of acts, breaches or otherwise. It had also erred in deciding that, since the final event—the employee's claim to have his grievance addressed—was not a breach, there was no breach at all. The finding that the conduct of the managers invoked a breach of the term of trust and confidence was itself sufficient to find in the employee's favour that there was at least one breach of contract. Further, consistent with the tribunal's approach of segmenting its analysis of the events, it then went on to consider the other complaints made by the employee and found, in his favour, that there was a breach of contract in failing to pay him his relief pay and his sick pay, in making a unilateral change to his pay date and in failing to pay his holiday pay. It was inconsistent of the tribunal not to have included those findings within its general approach to the question of repudiation. Not only did they indicate conduct by the employer of an unacceptable nature, they were also breaches of the employment contract. When added to the other significant breach of the term of trust and confidence and the other events, categorised as less than a breach, they did constitute a series falling within the "last straw" doctrine. The appeal tribunal would substitute a decision that there was a dismissal, and, given a correct direction on the law as to all the acts and breaches of contract, the facts pointed ineluctably to a decision that the dismissal was unfair. Accordingly, the case would be remitted for a remedy hearing.

Warren v S & N Pubs and Restaurants Ltd; 29 October 2002; EAT/1376/01
EAT: Judge McMullen QC, Mr P Dawson and Mr D J Hodgkins

DISABILITY

An employment tribunal held, as a preliminary point, that an applicant employee, who had complained of disability discrimination by her employers, was not disabled within the meaning of section 1 of the Disability Discrimination Act 1995.

MS RECORDER SLADE QC, allowing an appeal by the applicant, said that the expert evidence was that the applicant suffered from depression and abused alcohol. The majority in the employment tribunal had concluded that regulation 3 of the Disability Discrimination (Meaning of Disability) Regulations 1996, which provided for the purposes of the Act that alcohol addiction was excluded as an impairment, superseded paragraph 11 of the Guidance (on matters to be taken into account in determining questions relating to the definition of disability), which provided that tribunals should not have regard to the cause of a disability, even if that cause of itself would not amount to a disability or an impairment within the meaning of the Act, such as addiction to alcohol. Both the majority and the minority in the employment tribunal had erred in considering that there might be a conflict between the Guidance and the Act or the Guidance and the Regulations. The employment tribunal had erred in its approach, in that it was not material to a decision as to whether a person was suffering from a disability within the meaning of the Act to consider how the impairment from which they were suffering was caused. What was material was to ascertain whether the disability from which they were suffering at the material time was a disability within the meaning of the Act or whether, where it was relevant, as in the present case, it was an impairment which was excluded by the Regulations from being treated as such a disability. The tribunal's reasons indicated that, in its decision-making process, the tribunal had considered that it was important to understand what had caused the impairment from which the applicant was suffering at the material time.

at betrayed an error of approach so serious that the decision could not stand. The case would be nitted for rehearing of the preliminary point.

Power v Panasonic UK Ltd; 17 September 2002; EAT/747/01
EAT: Ms Recorder Slade QC, Mr D J Hodgkins and Mrs M T Prosser

SABILITY DISCRIMINATION

A teacher, who had been away from work for 10 months suffering from anxiety stress disorder, was missed for the reason that the school believed that she had no intention of returning to work. An ployment tribunal, while finding that the school had so concluded because of the applicant's incapacity rough illness to return to work, dismissed her complaint of disability discrimination on the ground that, ce the reason for the dismissal was because the school believed she did not intend to return, the decision dismiss the applicant did not relate to her disability but to that decision.

MR RECORDER HAND QC, allowing an appeal by the applicant, said that in *Clark v Novacold Ltd* 999] ICR 951, 962, the Court of Appeal's concern with the correct interpretation of section 5(1)(a) of the sability Discrimination Act 1995 focused on the phrase "that reason". The court accepted the argument it the words "that reason" referred only to the first three words of paragraph (a)—"for a reason". It ould be helpful for employment tribunals to remind themselves when considering whether there had been s favourable treatment of a disabled person "for a reason which relates to the disabled person's lability" that those words were there to "specify a link between the reason for the dismissal and [the] ability". Thus understood, it became more obvious that the relationship between the reason for the missal and the disability did not need to be direct. To find that an employee had been dismissed because their disability would automatically place the employer in breach of section 4(2) and section 5(1)(a) of Act, but to conclude that the reason for dismissal was not the disability did not mean that the ployee's case could be rejected without further inquiry; in such a case, it was necessary to ask whether reason for dismissal had a relationship to the disability in the sense that it was linked to it. There was thing to suggest that the employment tribunal had considered, in terms of an examination of the nature the reason for the applicant's dismissal and the nature of her disability, whether there was a relationship link between them. The belief as to the applicant's intent arose from the circumstances of her continued sence due to her anxiety stress disorder; that disorder kept her from returning to work. Thus the two had elationship and were linked together. The tribunal's finding that the two were not related had to have ceeded from the erroneous perspective that the tribunal need not look any further than the aracteristics of the reason for the dismissal. The inevitable and only answer to the question whether the son for the applicant's dismissal related to her disability was in the affirmative, and a finding to that ect would be substituted.

Shrubsole v Governors of Wellington School; 18 February 2003; EAT/328/02
EAT: Mr Recorder Hand QC, Lord Davies of Coity and Mrs D M Palmer

PLIED TERM

An employment tribunal upheld an employee's complaint of unfair constructive dismissal, holding t, by making a request for him to take a drug test without any prior discussion or explanation, his ployers were in breach of the implied term of trust and confidence such that the employee had been itled to resign.

JUDGE PETER CLARK, allowing an appeal by the employers, said that the employers submitted that formulating the relevant implied term of mutual trust and confidence the employment tribunal had itted an element, particularly material in the present case, to be found in the formulation expressly roved by the House of Lords in *Malik v Bank of Credit and Commerce International SA* [1997] R 606, 609, that an employer would not without reasonable and proper cause conduct itself in a manner ly to destroy or seriously damage the relationship of confidence and trust between employer and ployee. The critical element was that the employer's conduct had to be "without reasonable and proper se". In the present case it was arguable that the employers had reasonable and proper cause for uiring the employee to take a drug test. Whether or not they did have was a question the appeal tribunal ld not resolve and which had not been raised or answered below. The employment tribunal had fallen error in their formulation of the implied term by omitting that material element from the House of rds' formulation. On that ground the appeal would be allowed and the matter remitted for rehearing. employers had also submitted that the employment tribunal ought to have gone on to consider ether, if there was a dismissal, it was fair. The appeal tribunal was bound by the reasoning in *Aparu v land Frozen Foods plc* [2000] ICR 341 to conclude that, having failed to pursue before the employment unal the alternative case that if there was a dismissal it was fair, that point could not now be raised, l, as the case was being remitted for rehearing on the constructive dismissal issue only, it would not be n to the employers to advance that alterative point at the rehearing.

Dolby Hotel Liverpool Ltd v Farley; 30 October 2002; EAT/1140/01
EAT: Judge Peter Clark, Mr D Chadwick and Mr G Mills

COSTS

On complaints by six female employees that their employers' proposal to replace flexi-time workin with fixed hours was discriminatory in that a considerably smaller proportion of women than men coul work full-time fixed hours because of childcare responsibilities, the employment tribunal found that th employees had failed to show that that requirement was a detriment with which they could not comply an that, even if the employees had established indirect discrimination, the employers had shown that th requirement was justifiable irrespective of sex. The tribunal further found that the employees had acte unreasonably in pursuing the proceedings and made costs orders against them.

JUDGE PUGSLEY, allowing an appeal by the employees against the award of costs, said that th insufficiency of evidence as to the employees' difficulties in complying with the new regime did not in itself give rise to the inference that it was unreasonable to bring the case. There was no clear evidence to suppor the tribunal's finding that the employees knew or ought to have known that they had no realistic prospec of success. It could not be said that inherently and intrinsically the case was bound to fail. The tribuna had said that one employee got closer to establishing her case than another two, who in turn got closer tha the fourth employee. Could it properly be said that the application of a sliding scale was a proper exercis of discretion? Was their conduct unreasonable or not? If it was unreasonable, the costs would flow. Th sliding scale applied by the tribunal was somewhat muddled and there was no clear differentiation betwee the costs awarded for the unreasonable conduct in bringing the case and the costs awarded due t unreasonable conduct during the case. On the facts, the employees did not breach the threshold o unreasonableness set out in *Kovacs v Queen Mary and Westfield College* [2002] ICR 919. It was no sufficient that an applicant failed to prove her case. If costs were awarded on the same basis as the tribuna had done in the present case, access to tribunals would be severely limited because of fear of costs. Tha would not be a proper interpretation of the statutory provisions. The present case had been properl brought, and costs had not been awarded on a proper basis. It was inappropriate to remit the case to th same tribunal and no other tribunal would be in a better position than the appeal tribunal to make a decision. In that rare circumstance the appeal tribunal would reverse the tribunal's decision that cost should be paid by the employees.

Sood v Immigration Advisory Service; 25 October 2002; EAT/153/01
EAT: Judge Pugsley, Mrs M McArthur and Mr H Singh

PAID ANNUAL LEAVE

An employment tribunal upheld a claim by a casual worker for a local authority that he was entitled to paid holiday pursuant to regulation 13(1) of the Working Time Regulations 1998, alternatively under article 7 of the Working Time Directive 93/104.

JUDGE BURKE QC, allowing an appeal by the council, said that for the purposes of the applicant' claim regulation 13 applied in its unamended form. The appeal tribunal was bound by the Court o Appeal's decision in *Gibson v East Riding of Yorkshire Council* [2000] ICR 890 to decide that article 7 o the Directive was not at the material time capable of being directly enforced by the applicant against th council. In *Voteforce Associates Ltd v Quinn* [2002] ICR 1, paras 12–15, the appeal tribunal hac concluded that *R (BECTU) v Secretary of State for Trade and Industry* (Case C-173/99) [2001] ICR 1152 did not have the effect of alleviating the difficulties placed in the path of those who sought to rely directly on article 7. As in that case, the appeal tribunal was thrown back on the proper construction o regulation 13, and it was inescapable that, in order to succeed, the applicant had to bring himself within regulation 13(7) and (8). The schedule setting out the hours worked by the applicant showed that there was no single period of 13 weeks in which he had worked in each week. If and in so far as the tribunal hac reached its conclusion on the basis that there was a series of contracts between the applicant and the council, arising each time he was offered and accepted work, which in each of 13 successive weeks governed their relationship, that conclusion was demonstrably in error. Alternatively, the tribunal might have concluded that there was an overarching or umbrella contract which governed their relationship. The applicant signed two documents which set out that he would be offered work as and when required and paid weekly and which made clear that there was no contractual sick pay or holiday entitlement. As the appeal tribunal had concluded in *Volteforce*, the contract referred to in regulation 13(8) had to be a contract of service or a contract for services; the contract had to be one such as to render the individual a worker as defined by regulation 2(1). Though *Hellyer Brothers Ltd v McLeod* [1987] ICR 526 was not a case in which a contract of service or a contract for services was in issue, the decision underlined the essential need for mutuality of obligation to the existence of an umbrella contract of service; and in principle it was difficult to see why the need for or importance of such mutuality should be any less in the case of an umbrella contract for services. In the judgment of the appeal tribunal, mutuality of obligation to provide and perform work was as an essential an element of a contract for services as it was of a contract o

ervice; in the absence of such mutuality, a claim based on an umbrella contract, whether of service or for ervices, had to founder. Where the worker was free to choose whether to accept work if offered and could ot call on any obligation on the employer to provide work, the claim to an umbrella contract had to fail. uch mutuality could not be found in the documents signed by the applicant. Accordingly, if the tribunal's ecision in favour of the applicant was on the basis of an umbrella contract, it erred in law, and, on the rimary facts, the tribunal should have concluded that the applicant's claim failed and it would be ismissed.

South Tyneside Metropolitan Borough Council v Toulson; 28 November 2002; EAT/1333/01
EAT: Judge Burke QC, Lord Davies of Coity and Dr D Grieves

ACE DISCRIMINATION

An employment tribunal, on a complaint of race discrimination, found that a remark, to the effect that eople of black Afro-Caribbean origin "come over here and scrounge off the system and then go back", ade by a fellow employee, constituted racial harassment of the applicant and made awards of ompensation against the fellow employee and the employers.

JUDGE REID QC, allowing an appeal by the fellow employee and the employers, said that the words omplained of should never have been used. They were not directed at the applicant but could be taken as eing aimed at her parents. The employers recognised that and disciplined the employee promptly for her emarks. The tribunal had deprived the appellants of the chance of cross-examining the applicant about ne effect of the words on her. There was material on which substantial cross-examination could have been ounted as to the true effect of the words on the applicant. That would only have been immaterial if the ribunal had been correct in its view that if it was proved that the words were spoken there was necessarily etriment. If treatment was race specific there was no need to show that a person of a different colour ould have been treated differently. But section 4(2)(c) of the Race Relations Act 1976 did require a omplainant to show that he had been subjected to detriment. In *De Souza v Automobile Association* [1986] ICR 514, 522, May LJ said: "Racially to insult a coloured employee is not enough of itself, even if hat insult caused him or her distress . . . the court must find that by reason of the act . . . a reasonable orker would or might take the view that he had thereby been disadvantaged in the circumstances in hich he had to work thereafter." That dictum had now to be treated with some reserve because it was ear that some levels of distress would be regarded as detriment, and in any event an environment where acist remarks were tolerated might itself be a detriment. While a single act of abuse was enough to found a omplaint, it did not necessarily amount to harassment. "Harassment" involved two elements: the rgeting of the person being harassed and the causing of distress to the target. In very many cases the econd element would be extremely easy for the employee to establish, but that did not entitle the tribunal o assume the second element, nor, as the tribunal appeared to have done in the present case, to decide that ne proof of the language created an irrebuttable presumption of detriment. There were some work nvironments in which (undesirable though it might be) racial abuse was given and taken in good part by nembers of different ethnic groups. In such cases the mere making of a racist remark could not be regarded s a detriment. In the present case there was a single remark, clearly not directed to the applicant herself. It as made by a fellow junior employee. It was not the subject of complaint until considerably later. There as evidence of the two protagonists being on very good terms in the aftermath of the incident. The ribunal had erred in law in failing to consider whether there was a detriment and in preventing the ppellants from cross-examining to show that there was not. The matter would have to be remitted to a ifferent tribunal.

Thomas v Robinson; 21 October 2002; EAT/737/01
EAT: Judge Reid QC, Mr D A C Lambert and Mr J C Shrigley

ETIRING AGE

An employee who was approaching 60 years was asked by his employer whether he wished to retire at o, whether he wished to retire at 60, draw his lump sum and be re-employed in the same grade until he as 62 (the "maximum" retiring age for his grade) or whether he wished to continue to 62 before retiring. le chose the second option, but three days before his 60th birthday he was notified that his employer had ecided not to re-employ him. On his complaint of unfair dismissal, an employment tribunal found, as a reliminary issue, that the normal retiring age for employees holding the applicant's position was 62 and e was not therefore precluded by section 109 of the Employment Rights Act 1996 from pursuing his omplaint.

WALL J, allowing an appeal by the employers, said that the employment tribunal had plainly failed to llow the guidance contained in the speech of Lord Fraser of Tullybelton in *Waite v Government Communications Headquarters* [1983] ICR 653, 662–663. Lord Fraser rejected the view that the ontractual age conclusively fixed the normal retirement age, but, however one looked at it, that was the nding made by the tribunal. The tribunal's use of the phrase "the contractual retiring age and therefore ne normal retiring age" could only be construed as a clear misdirection in law. Had the tribunal found

60 to be the contractual retiring age, that would not necessarily have been the end of the matter. Th tribunal would then have needed to examine any evidence available to rebut the presumption that th contractual retiring age was the normal retiring age for employees of the applicant's grade. In that contex statistics as to the number of employees who stayed beyond 60 would be relevant. The quality of th statistics, and how informative they were, were, of course, matters of evidence for the tribunal. It did not however, attempt to evaluate the statistics: it merely deemed them irrelevant. Nothing in *Hughes v Department of Health and Social Security* [1985] ICR 419 derogated from Lord Fraser's speech in *Wait* and the proper approach he laid down to what was now section 109 of the Employment Rights Act 1996 The question for the tribunal was whether or not the applicant had a reasonable expectation of having a normal retirement age of 62 based on the documentation and any other admissible evidence. The fact tha there had been a practice of permitting employees to remain in employment up to 62 might well b evidence in support of that reasonable expectation but it was in no sense determinative of it. However, th tribunal could only properly approach the question by deciding first what his contractual retiring age was If it was 60, the question of reasonable expectation of a normal retiring age of 62 would then arise. If 62 the question of reasonable expectation was irrelevant. It was not permissible, as the tribunal appeared to have done, to use the concept of "reasonable expectation" as a means of ascertaining the contractua retiring age. The matter would be remitted for rehearing. As neither party submitted that there was no contractual retiring age, the issue would be whether it was the same as the normal retiring age.

Customs and Excise Comrs v Jayawardane; 2 December 2002; EAT/1092/01
EAT: Wall J, Mr A E R Manners and Mr S M Springer

UNFAIR DISMISSAL

In October 2001 employers decided to make redundant one of two field service engineers that i employed and gave the applicant notice expiring on 30 November, on which date the other engineer informed the employers that he was resigning. On the applicant's complaint of unfair dismissal, the employment tribunal found that there had been improper consultation over the selection of the applican for redundancy and determined, pursuant to *Polkey v A E Dayton Services Ltd* [1988] ICR 142, that, had a fair procedure operated, the applicant's employment would have continued until 31 December 2001; and it awarded compensation on that basis.

JUDGE McMULLEN QC, allowing an appeal by the applicant, said that the employment tribunal's approach had been attacked on the basis of *Stacey v Babcock Power Ltd* [1986] ICR 221. It was clear that all information available to an employer at the date of termination of the employment relationship was relevant in considering the fairness of a dismissal: see *Williamson v Alcan (UK) Ltd* [1978] ICR 104, 109B–C. The employment tribunal had not been referred to the cases now relied on. Though the employers accepted that *Stacey* was relevant, they submitted that it should be distinguished. The appeal tribunal disagreed. *Stacey* was authority for the proposition that a fair dismissal might become unfair as a result of supervening events. It became unfair to carry out an otherwise genuine redundancy dismissal when either more work became available, as in *Stacey*, or the pool of people to be dismissed reduced, as in the present case. Had the tribunal applied *Stacey*, the situation as to the *Polkey* reduction would have been different. The chronology of the case indicated that the applicant would not have been dismissed had a proper procedure been carried out, since if he had been engaged for a further month until the end of December 2001, when the other engineer left, there would have been no need for the employers to have engaged someone else. The correct finding, that no dismissal would have occurred, would be substituted for the limitation of the period of compensation to one month, and the matter remitted to decide the compensation due on that basis.

Colvin v Attol Business Systems Ltd; 29 November 2002; EAT/880/02
EAT: Judge McMullen QC, Mr R N Straker and Mr G H Wright

OMPENSATION

An employee who was made an offer of promotion which was then withdrawn by her employers mplained that she had been discriminated against on the ground of trade union activities. The complaint as upheld by the employment tribunal which awarded the employee compensation of £5,000 for injury to elings.

ELIAS J, dismissing an appeal by the employers against the amount of the award, said that it was gued that the tribunal ought to have made explicit comparison with the appropriate range of awards in rsonal injury cases; that it had erred in treating the range of awards for damages for injured feelings in e present case as being in the same range as those in cases of race and sex discrimination; and that the ard was excessive. There was no need for a tribunal expressly to seek to locate where it would place the cts of the case before it in the framework of awards for injuries in personal injury cases. The Court of peal in *Vento v Chief Constable of West Yorkshire* [2003] ICR 318 approved observations of Smith J in *ison Service v Johnson* [1997] ICR 275, 283: "Awards should bear some broad general similarity to the nge of awards in personal injury cases. We do not think that this should be done by reference to any rticular type of personal injury award, rather to the whole range of such awards." There were no ounds for asserting that discrimination on trade union grounds would justify lower awards of mpensation than for other forms of discrimination such as race or sex. In each case it was necessary to tablish the loss by focusing on the particular injury suffered. If the injury in two cases was the same, it ould not be just to award different levels of compensation simply because the source of the injury was fferent forms of discrimination. But it ought not readily to be assumed that injury to feelings inevitably wed from each and every unlawful act of discrimination. Some persons discriminated against on trade ion grounds might feel deeply hurt by that affront, particularly where union membership was an portant feature of their lives; other more robust characters might consider it of little consequence and ffer little, if any, distress. Since the aim was to compensate and not to punish, the compensation to be arded ought not to be the same in each case. In *Vento* the Court of Appeal gave guidance as to the propriate level of awards. In the light of that guidance, the appeal tribunal had to decide whether the m awarded was larger than appropriate for the nature of the injury sustained. Although it was on the gh side, it was not so clearly erroneous as to justify intervention.

Hackney London Borough Council v Adams; 6 February 2003; EAT/1318/01
EAT: Elias J, Miss C Holroyd and Mr G H Wright

ISABILITY DISCRIMINATION

An employment tribunal dismissed a complaint by an employee that she had been dismissed for a ason relating to her disability contrary to section 4 of the Disability Discrimination Act 1995.

ELIAS J, dismissing an appeal by the employee, said that whether someone was dismissed for a reason lating to her disability was simply a question of fact. The tribunal had found that the reason for the ployee's dismissal was performance and that the alleged shortcomings were in no way related to her sability. On the face of it that was a finding of fact which determined the outcome of the claim, as the bunal held. It was submitted on behalf of the employee, however, that the tribunal had failed to make rtain findings of fact which it was obliged to make before reaching its decision. It was submitted that inciples enunciated in *Anya v University of Oxford* [2001] ICR 847, 859–860, paras 23, 25, in the ntext of race discrimination, ought to apply equally to cases of disability discrimination; that there was e same risk that an employer might seek to conceal the real basis for his actions, or, alternatively, might unconsciously influenced by considerations in relation to the disability of the employee. While cepting that the same risks might, in certain contexts, arise and that the approach in disability cases ght to be as indicated in *Anya*, albeit that in practice there might be less risk of unconscious or intended prejudice motivating decisions in that area, the question was: what were the material facts in spect of which findings needed to be made? *Anya's* case did not say that a tribunal had to resolve every atter of disputed fact. The present case was materially different to *Anya*. It was not a case where the anager taking the decision to dismiss could have been unconsciously influenced by the employee's sences. A person could not be influenced by a factor, whether consciously or unconsciously, if he was aware of it. Notwithstanding that the tribunal found weaknesses in the employers' evidence, it reached e clear conclusion that the manager was telling the truth. In those circumstances, since he did not know the factors relied on as the basis of the disability claim, he could not have been dismissing for reasons lating to disability. That was not necessarily the end of the matter in all cases, because someone who was aware of factors which might demonstrate an improper discriminatory influence might nevertheless be fluenced by discriminatory considerations. After careful consideration, it seemed to the appeal tribunal at the tribunal's decision, fairly read, indicated that the manager had come to his own independent

decision. There was no evidence to suggest that he had acted on the basis of any tainted evidence; moreover, the case did not appear to have been run on that basis.

Williams v YKK (UK) Ltd; 22 November 2002; EAT/408/01
EAT: Elias J, Ms J Drake and Mr P Gammon

REDUNDANCY

An employee, one of two executive assistants employed by her employers, was selected for redundancy when the employers decided they no longer had any need for two executive assistants, at a time when the employee was absent from work suffering from severe depression and unable to contemplate returning to work. On complaints by the employee, the employment tribunal held that (1) the employee had been dismissed by reason of redundancy; (2) the dismissal was unfair; and (3) the employers had discriminated against the employee, contrary to section 4(2)(d) of the Disability Discrimination Act 1995, by dismissing her.

WALL J, dismissing an appeal by the employers, said that the employment tribunal found that the employee had been given no prior warning of impending redundancy and had been consulted only in respect of redeployment. The tribunal did not consider that proper consultation would genuinely have been fruitless and held that there was procedural unfairness in the redundancy process. Finally, the tribunal found that it was because she was absent, owing to her disability, that the employers had failed to discuss the redundancy situation with her and that no justification had been put forward for that less favourable treatment. The employers argued that, in the context of the tribunal's findings that there was a genuine redundancy situation and that the employee had been dismissed as redundant following the application of genuine selection criteria, it was inconsistent of the tribunal to find that the dismissal constituted an act of disability discrimination. On unfair dismissal, the employers submitted that it was the employee's own act, in saying, in a letter to the employers, that there were no circumstances under which she would have returned to work for the employers, that brought about the alleged "procedural unfairness". In the judgment of the appeal tribunal, there was material on which the tribunal could properly reach each of its three conclusions, and there was nothing inconsistent between the findings that the employee was dismissed by reason of redundancy and that the dismissal was both unfair and discriminatory consequent on her disability. The evidence plainly entitled the tribunal to find that the redundancy process was procedurally and substantively unfair, given the failure to consult and the presentation of what was, in effect, a fait accompli. It would not be just to permit the employers to rely on the employee's letter since it followed the fact of the employers informing her, without warning or consultation or even informing her of the selection criteria, that she was to be made redundant.

Bax Global Ltd v French; 29 November 2002; EAT/812/01
EAT: Wall J, Mr D Chadwick and Mr K Edmondson

STRIKING OUT

An order dismissing an applicant's complaint of race discrimination, following the rejection of his renewed application to adjourn the hearing, which had been listed for 10 days, was subsequently revoked by the employment tribunal. The complaint was later combined with a second complaint, and, when the applicant's renewed application to postpone the listed hearing of those complaints was rejected, he refused to proceed. The employment tribunal struck out the complaints, under rule 13(2)(e)(f) of the Employment Tribunals Rules of Procedure 1993, on the grounds of want of prosecution and that the applicant had conducted the proceedings in a manner both scandalous and frivolous.

JUDGE PETER CLARK, dismissing an appeal by the applicant, said that the appeal tribunal accepted the respondents' submission that the expression "want of prosecution" embraced conduct by a party which gave rise to the inference that he did not intend to bring the proceedings to a conclusion. It included the case of a party whose deliberate default in compliance with a peremptory order of the court or tribunal or whose conduct was an abuse of process was coupled with a substantial risk that it was not possible to have a fair trial. Surveying the course of the present litigation, the appeal tribunal had no doubt that the applicant's conduct was an abuse of process. It was designed to cause maximum vexation, inconvenience and expense to the respondents and their witnesses. The final straw had been the applicant's refusal to prosecute his case. Want of prosecution did not simply arise at the interlocutory stage of proceedings. It could also arise, and on the facts of the present case did arise, when the full hearing was reached and the applicant refused to prosecute his case. The employment tribunal had been perfectly entitled to strike out the complaints on that ground. Strictly, that disposed of the appeal, however, the appeal tribunal further found that the relevant decision could properly be upheld on the ground that the applicant's conduct was both frivolous and scandalous for the reasons given by the employment tribunal. The respondents applied for costs. Bearing in mind that the appeal had been permitted to proceed to a full hearing, one could not say that the applicant's initial stance in pursuing the appeal was unnecessary or otherwise fell within the terms of rule 34 of the Employment Appeal Tribunal Rules. However, it seemed clear that the applicant had not adopted or advanced any of the grounds on which the appeal had been permitted to proceed. In

ose circumstances, the appeal hearing was wholly unnecessary and the respondents were entitled to their sts.

Zalzala v Sheffield University; 29 November 2002; EAT/201/01
EAT: Judge Peter Clark, Lord Davies of Coity and Mrs D M Palmer

EINSTATEMENT

An employment tribunal made an order for the reinstatement of an applicant employee under ction 114 of the Employment Rights Act 1996 following a finding of unfair dismissal. The employers iled to comply with the order and, on their appeal, the appeal tribunal remitted the case for consideration on the ground that the issue of contributory conduct had been raised at the hearing but not nsidered by the tribunal. At the remitted hearing the tribunal found that the applicant had not ntributed to his dismissal; it excluded evidence of matters occurring after the date of the employers' cision not to comply with the reinstatement order, in relation to whether it was practicable to reinstate e employee, and awarded compensation which included an additional award.

JUDGE PETER CLARK, allowing an appeal by the employers, said that in its decision on the remitted aring the tribunal stated that at the remedies hearing it had determined the issue of contribution orally it it simply had not been recorded in the written decision. A finding on contribution was an essential part the tribunal's reasoning. That proposition was derived from the mandatory requirement in rule 12(3) of e Employment Tribunals Rules of Procedure 2001 that the tribunal "shall give reasons for its decision in document signed by the chairman" and *Portsea Island Mutual Co-operative Society Ltd v Rees* [1980] R 260, 264. At the remitted hearing the tribunal had expressed its conclusions on contribution but had iled to provide any adequate reasons for that conclusion. The matter would have to be remitted for a rther decision so that the employers might know why they lost on that issue. The questions for the bunal were: was the applicant guilty of blameworthy conduct in any or all of the respects alleged? If so, d that conduct cause or contribute to the dismissal (as opposed to its fairness)? In the event of a finding of ntribution, it was for the employment tribunal to assess the degree of contribution. It was submitted that e tribunal had wrongly excluded relevant and admissible evidence that went to the issue of practicability. was clearly established (see *Port of London Authority v Payne* [1994] ICR 555, 569–570) that the medy of reinstatement involved a two-stage process, the first stage, at the initial remedies hearing, was to ok forward. The employment tribunal was required to form a provisional view as to whether nstatement was practicable. If so, an order was made, specifying the date reinstatement was to take ace. If the employer failed to reinstate, the matter returned to the tribunal for a further remedies hearing. that stage it was open to the employer to seek to show, the burden resting firmly on him, that it was not acticable to reinstate the applicant. At that second stage the tribunal was looking back, finally termining the question of practicability on the facts which had actually occurred. The relevant date for termining the practicability or otherwise of reinstatement at the second stage was the date on which nstatement was ordered to take place. It followed that the relevant date was not, as the tribunal found, e date on which the employers decided not to comply with the order. The statutory question was not hy the employer did not fully comply with the reinstatement order (his reason) but whether it was not acticable to do so. That question had to be answered on the actual facts as they existed on the date dered for compliance. The case would be remitted with a direction to admit the relevant excluded dence.

Yorkshire Rider (t/a First Huddersfield) v Neckles; 20 December 2002; EAT 89/02
EAT: Judge Peter Clark, Mr M Clancy and Mr D Smith

SMALL BUSINESS EXEMPTION

An employment tribunal rejected an applicant's complaint of disability discrimination on the groun that the respondent employment agency was an employer with fewer than 15 employees for the purpos of the small business exemption in section 7 of the Disability Discrimination Act 1995 (as amended by th Disability Discrimination (Exemption for Small Employers) Order 1998).

JUDGE McMULLEN QC, allowing an appeal by the applicant, said that the respondent agenc employed six persons, but had on its books a large number of people who were engaged under what wer called "temporary worker" contracts. In any given week it would send to its clients between 130 and 20 temporary workers. The business suffered as a result of the loss of a major client and the applicant wa chosen for dismissal. The exemption in section 7 of the 1995 Act had to be strictly construed. Th applicant was entitled to a hearing of her complaint unless it was clear that her right was excluded. Th employment tribunal decided that the headcount of temporary workers on the agency's books should no be included for the purposes of section 7. The tribunal had expressly based its decision on the definitions i section 230 of the Employment Rights Act 1996, but had failed to address itself to section 68 of the 199 Act and had erred in failing to deal with the applicant's submission that the definition of "employment was regulated for the purposes of the Disability Discrimination Act 1995 by that Act and not by th Employment Rights Act 1996. Though that would be sufficient to remit the case, the appeal tribun would deal with the substance of the argument. The temporary worker contract contained expre references to the Working Time Regulations 1998, claims for any breach of which it was accepted would b made against the agency. Accordingly, the temporary worker must be within the definition i regulation 2 of those Regulations and, on that analysis, performed personally any work or services fo another party to the contract, i e the agency. The persons affected by the temporary worker contract wer workers; they did work; they could not substitute another person to take their place. Though the work wa done for a client of the agency, in practical terms, the contractual relationship was exclusively between th temporary worker and the agency, and the fact that the work was performed for the client did not take outside the scope of section 68. All that was required was for there to be an obligation to do work. Tha was the simple answer to the legal point in issue. The employment tribunal had considered the definition contract workers as opposed to employees within section 12, but that was not relevant to the corre meaning of section 68. The tribunal also considered the agency's degree of control over its temporar workers. Again, that matter did not arise. The correct answer was to look simply at section 68 and t make an assessment of whether or not the temporary worker contract fitted within that definition. Thoug the language of the contract excluded the relationship of a contract of employment as between the agenc and the worker, viewed as a whole, the obligations set out in the contract corresponded to those envisage in section 68.

Burton v Frances Higham (t/a Ace Appointments); 14 February 2003; EAT/609/02
EAT: Judge McMullen QC, Mr P R A Jacques and Mrs M McArthur

TIME LIMIT

An employment tribunal chairman ruled, at a hearing for directions of a complaint of rac discrimination received by respondents on 31 May 2002, that a notice of appearance presented by th respondents on 21 June 2002 was in time under rule 3(1) of the Employment Tribunals Rules of Procedu 2001.

JUDGE McMULLEN QC, dismissing an interlocutory appeal by the applicant, said that the matte could not be clearer than in the Employment Tribunals (Constitution and Rules of Procedure) Regulation 2001, which was the modern approach to drafting rules, so that one saw properly worked out examples b reference to the calendar. Calculation began, under regulation 2(7), the day after the relevant event. In th present case that was 1 June 2002, and, thus, 21 June 2002 was within 21 days of the service of th originating application on the respondents. Regulation 2 entirely governed the factual circumstances of th present case and there was no error in the construction adopted by the tribunal chairman. The responden applied for costs under rule 34 of the Employment Appeal Tribunal Rules. The applicant, who wa appearing in person, had a law degree and had been called to the Bar in 1998; his skeleton argument mad it clear that he had thoroughly researched his arguments. It was unreasonable conduct, going beyon simply making an error of law, for a person with such a background not to have read the sole rule referre to by the chairman in giving his decision, even after sight of the respondents' skeleton argument. The poin was obvious and the respondents had not been called on. The applicant submitted that his means shoul be considered, but the court was required to disregard them by the Court of Appeal decision in *Kovacs v Queen Mary and Westfield College* [2002] ICR 919, at least until the Employment Act 2002 was brough into effect. The Treasury Solicitor had claimed six hours' preparation and attendance at £142·50 per hou For a solicitor in Central London, even in the public service, there seemed nothing offensive about that rat

ugh confirmation that that was the right figure had to be submitted; but the amount of time given to the e by the solicitor did seem excessive, as she instructed counsel. Two hours would be awarded. The gestion that it was not proportionate to have counsel at the hearing, given that the solicitor had peared in the employment tribunal, was rejected. It was entirely appropriate for the Lord Chancellor's partment and for a judge sued personally to wish to be represented by experienced counsel. The five urs, at the Treasury Panel rate of £100 per hour, claimed for counsel's preparation and attendance uld be allowed.

Moore v Lord Chancellor's Department; 14 February 2003; EAT/64/03
EAT: Judge McMullen QC

TNESS ORDER

An employment tribunal chairman refused applications by an applicant employee for witness orders on grounds that the applicant had failed to state what evidence the witness was expected to give and that it peared that he might be seeking to call the witnesses solely in order to cross-examine them. The plicant's complaint was subsequently dismissed and he appealed against both decisions. The appeal unal extended time for appealing against the refusal of the witness orders and permitted the appeal to ceed to a full hearing without extended reasons.

JUDGE PETER CLARK, dismissing the appeals, said that the appeal tribunal had first to satisfy itself t it had jurisdiction to hear the appeal against the refusal of the witness orders [an issue raised by the peal tribunal at an interlocutory stage], though jurisdiction was not disputed by the respondent ployer. The grant or refusal of a witness order was not an administrative act but a judicial decision perly characterised as an interlocutory order. Regulation 2(2) of the Employment Tribunals nstitution and Procedure) Regulations 2001 defined "decision". It did not include interlocutory orders de or refused under rule 4(5) of the Employment Tribunals Rules of Procedure in Schedule 1 to the 2001 gulations. The use of the expression "decision of, or arising in any proceedings" in section 21(1) of the ployment Tribunals Act 1996 had to include not only a decision as defined in regulation 2(2) of the 01 Regulations but also interlocutory orders, not being decisions, themselves arising in proceedings ore an employment tribunal. If there were any doubt, it was removed by rule 3 of the Employment peal Tribunal Rules 1993 which referred to "the decision or order of an employment tribunal". Thus, Employment Appeal Tribunal had jurisdiction to hear appeals against interlocutory orders, not being cisions" of the employment tribunal. The time for appealing under rule 3(3)(a) was 42 days from the e on which extended reasons for the decision or order were sent to the appellant. The difficulty was t, whereas a tribunal could be required to provide extended reasons for its decision, the same was not so espect of orders not being decisions. In practice that mismatch was avoided by recourse to rule 39(2) of 1993 Rules, waiving the requirement for extended reasons. That lacuna had recently been filled by agraph 3(1) of *Practice Direction (Employment Appeal Tribunal: Procedure)* [2003] ICR 122, 124. appeal tribunal rejected the employer's submission that, by failing at the substantive hearing to renew earlier application for a witness order, the applicant could not now rely on any error in relation to the sal of the witness orders to set aside the substantive decision. By not renewing his application, the licant was not conceding the point. It had been judicially determined against him, and it would only be propriate to renew his application if there had been a material change of circumstance. A witness order uld be made to compel the attendance of a witness where the tribunal was satisfied (a) that the witness ld give prima facie relevant evidence, and (b) that it was necessary to issue a witness order. Plainly the ctice of paper applications for witness orders in advance of a substantive hearing was a sensible course. wever, it was incumbent on the party applying for the witness order to indicate precisely what evidence ought to adduce from the proposed witness so as to pass the test of prima facie relevance. The tribunal, hairman, had a discretion which had to be exercised judicially. Relevant factors to be weighed in the ance might include the degree of relevance of the witness's evidence and consideration of whether, in er to extract relevant evidence, the party calling the witness would need, impermissibly, to cross-mine his own witness. The question was whether the chairman, on the material then available, failed to e into account relevant factors, or took into account irrelevant factors, or otherwise reached a clusion which was legally perverse. The state of knowledge at the relevant stage was that both nesses had failed to respond. In those circumstances the applicant was not putting forward what the nesses had told him they would say in evidence, rather what he hoped and felt they would say. In those umstances it had been open to the chairman to infer that in order to elicit their evidence it would be essary for the applicant to put leading questions to the witnesses; in other words, to cross-examine n. The reason put forward by the chairman was both permissible and relevant. More generally, it was ect that the full reasons for the order were not set out, but, since the appeal was heard in the absence of nded reasons, the ordinary principle—that the tribunal should tell parties why they had won or lost—ld not apply with full rigour.

Haydock v G D Cocker & Sons Ltd; 18 December 2002; EAT/215/02
EAT: Judge Peter Clark, Mr D J Jenkins and Mr G Lewis

UNFAIR DISMISSAL

An applicant employee spent half her time as secretary to the managing director and half as personne officer, with two employees reporting to her on personnel matters. When one of those employees wa offered a post as full-time personnel officer, after the applicant had proposed that she herself should take o a full-time personnel role, she raised a grievance, and, when she was offered a grievance meeting with member of the board of directors subject to producing a medical report showing that she was fit to pursue grievance, she resigned. An employment tribunal upheld the applicant's complaint of unfair dismissa holding that there had been an initial breach of contract by the employer in fundamentally changing he job structure and status, which was compounded by the subsequent handling of her grievance, destroyin the relationship of trust and confidence.

JUDGE PETER CLARK, allowing an appeal by the employer, said that the employer submitted tha the employment tribunal found no term of the contract that the two employees reported to the applican thus, removal of those reports could not amount to a breach of the contract, let alone a fundamenta breach. The appeal tribunal accepted that submission in so far as it went. However, there was a furthe difficulty. It was the applicant's case in part that the employer was in fundamental breach by effecting substantial change in her status and job content. The employment tribunal made no finding of fact on tha contention, saying "whatever the changes to the job content might or might not be". It followed that th decision was flawed in purporting to find a breach of a non existent term and in failing to make a clea finding as to whether the relevant contractual term, the personnel function, was breached and breache fundamentally. Further, the employment tribunal, in formulating the implied term of mutual trust an confidence, omitted reference to the qualification "without reasonable and proper cause". The employe submitted that the tribunal fell into error in concluding that it was in breach of the implied term in failin to deal properly with the applicant's grievance at the same time finding that she had not sought to pursu her grievance in accordance with the terms of her contract of employment. The employer submitted correctly, that an employer could not be held to have breached the implied term, without reasonable an proper cause, in circumstances where the employer was seeking to apply the contractual grievanc procedure and the employee was not. The employment tribunal's use of the word "compounded" was no altogether easy to follow, and the appeal tribunal were unsure as to precisely what facts the employmen tribunal found amounted to a fundamental breach of the implied term. As to the fairness of any dismissa the employer submitted that the passage from the judgment of the court given by Browne-Wilkinson LJ i *Berriman v Delabole Slate Ltd* [1985] ICR 546, 550G–551A, meant that it was for the employer to justify th conduct which the employee complained amounted to a repudiatory breach. That was not th understanding of the appeal tribunal. Section 98(1) of the Employment Rights Act 1996, the successor t section 57(1) of the Employment Protection (Consolidation) Act 1978, required the employer to show potentially fair reason for dismissal and dismissal included constructive dismissal under section 95(1)(c) Thus it was for the employer to show a potentially fair reason for the constructive dismissal in accordanc with section 98(2) or some other substantial reason (section 98(1)(b)). The employer was not required t justify the repudiatory conduct, but to show the reason for it. That led on to the difficulty in the tribunal finding that the constructive dismissal, as found, was unfair. Nowhere from the tribunal's reasons coul the appeal tribunal discern (a) the potentially fair reason for dismissal advanced by the employer and (b) th tribunal's finding as to whether that reason was established. The tribunal found that it could not be sai that the employer acted reasonably within section 98(4), but that was not the statutory question. Th tribunal had first to find a potentially fair reason for the dismissal. If none was advanced, the dismissal wa unfair. Section 98(4) was not engaged. If a potentially fair reason was established, it was then th reasonableness of the employer's decision to dismiss for that reason which fell to be considered unde section 98(4), not the conduct of the employer which led the employee to resign in a constructive dismissa case. The tribunal decision was fundamentally flawed, and the only proper course was to remit the matte to a fresh tribunal for the entire case to be reheard.

Cape Industrial Services Ltd v Ambler; 20 December 2002; EAT/950/01
EAT: Judge Peter Clark, Mr D J Hodgkins and Mr N D Willis

SABILITY DISCRIMINATION

An employee, an apprentice bricklayer, complained, inter alia, that he had been subjected to a ntinuing act of disability discrimination arising from bullying by other persons working with him. The ployment tribunal dismissed the complaint on the ground that the employer was not liable for disability crimination by a contractor's operatives under section 58 of the Disability Discrimination Act 1995.

JUDGE PROPHET, allowing an appeal by the employee, said that the employment tribunal were are of the basic nature of the contract between the contractor and the employer, ie to provide cklaying services; and it was open to them to reach the conclusion that it could not properly be described one which involved a contract personally to do work. It was submitted on behalf of the employee that employment tribunal should have considered the possible application of the principles in *Burton v De re Hotels Ltd* [1997] ICR 1, which undoubtedly applied to race and sex discrimination, to the ployee's disability discrimination complaint. The employer argued that the wording of section 5(1) of 1995 Act did not permit the application of the *Burton* principles to that Act; that discrimination could ly be found on the part of an employer under section 5(1) if "for a reason which relates to the disabled rson's disability, *he* treats him less favourably . . ." The difficulty with the employer's submission was t it did not allow the disability discrimination legislation to provide any protection for someone in the sent employee's position, assuming that there was harassment from the operatives that could qualify as ability discrimination. It would be an odd result if the principles in Burton could not be applied to ability discrimination simply because of the way in which the terms of the 1995 Act had been set down. e appeal tribunal favoured a purposive construction of the legislation so that so far as possible crimination legislation moved in harmony. There was no reason why the duty place on an *employer* by tion 4(2)(d) of the 1995 Act (which had the same wording as the Race Relations Act 1976 and the Sex crimination Act 1975 which was the basis of the *Burton* ruling) should be thwarted by the definition of crimination in section 5(1) where the words "a reason which relates to the disabled person's disability" re usually regarded as having a wide sweep. The employee had a strong case for arguing that the ntrol" principles enunciated in *Burton* should apply to the employer who had contract labour. The case uld be remitted for further consideration, but the employer would have leave to appeal.

Ree v Redrow Homes (Yorkshire) Ltd; 9 April 2003; EAT/35/03
EAT: Judge Prophet, Ms S R Corby and Mr G Lewis

MEDY

An employee was dismissed for gross misconduct when his employer formed the view that he was ponsible for pools of liquid, believed to be urine, on the locker room floor. An employment tribunal nd that the dismissal had been unfair, in that there were doubts about the reasonableness of the ployer's grounds for concluding that the employee was guilty of misconduct, the investigation was not sonable and the decision to dismiss summarily was not a reasonable sanction; but held that, applying rule in *Devis v Atkins* [1977] ICR 662, it was not just and equitable to award him any remedy as the ployer would have had adequate grounds for dismissing the employee fairly because he had deliberately led the employer as to the nature of his medication, holding himself out as diabetic in order to work er hours.

ELIAS J, allowing an appeal by the employee, said that the principal ground of appeal was that the unal had failed to comply with the principles of natural justice in that they did not give the employee opportunity to deal specifically with the *Devis v Atkins* point. The employer submitted that the ployee had had the opportunity to make representations and that, in any event, the present was one of se exceptional cases where there was nothing that the employee could say; that it would be fruitless to it the matter when the case against the employee was overwhelming. The appeal tribunal could see the e of those submissions, and no doubt there were exceptional cases, but the present was not such a case. was said on behalf of the employee that there might be additional evidence he could advance and that, reover, it was far from clear that even if there had been deliberate deceit it would have justified missal. The appeal tribunal was satisfied that it would be wrong, in the circumstances, to deprive the ployee of an opportunity to call such evidence as he thought might be relevant to the issue and to make missions in relation to the point. The employment tribunal considered that the employee had had the ortunity to deal with the matter but had not taken advantage of it. The appeal tribunal did not think t that opportunity had been sufficiently unambiguously made available to him to justify being satisfied t he had been fairly treated. Accordingly, there had been an infringement of the principles of natural ice and the matter would be remitted for the question of remedy to be considered. It was submitted on alf of the employee that, in any event, even if the tribunal could properly conclude that it was not just l equitable to grant compensation, they could not strictly and in accordance with section 116 of the ployment Rights Act 1996 have refused to grant the remedies of reinstatement or re-engagement for the

reasons they gave. It was not necessary, finally, to decide that matter, but it did seem that the employmer tribunal probably did have a broad discretion to do what was just and was not limited by section 116 onl to take into account the matters there referred to. It would be very strange if a tribunal were entitled t award no compensation under the *Devis v Atkins* principle but could not, on the same basis, refuse to mak an order of reinstatement or re-engagement. Counsel for the employee recognised that it might properly b said that it would not be practicable for an employer to comply with such an order where it had lost trus and confidence in the employee but submitted that that was not the way in which the employment tribuna had framed their decision. Even if that analysis was strictly correct, the appeal tribunal would not hav remitted the matter simply on the basis that the tribunal expressed their reason for refusing reinstatemer or re-engagement on the broad ground that it was not just and equitable to do so, without saying in term that it was not practicable to do so.

Iqbal v Consignia plc; 5 December 2002; EAT/1364/01
EAT: Elias J, Mr M Clancy and Mr T Haywood

UNFAIR DISMISSAL

An employee was dismissed, after 24 years with his employer, on the ground that he had taken a day holiday when he was aware that he had not been entitled to do so. An employment tribunal rejected h complaint of unfair dismissal on the ground that the dismissal was not unfair.

KEITH J, on an appeal by the employee, said that a conventional approach to the evidence, in line wit *British Home Stores Ltd v Burchell (Note)* [1980] ICR 303, would have been for the employment tribuna to consider whether the employer could reasonably have concluded that the employee had been aware tha he had not been entitled to take the day's holiday. Instead, the tribunal decided *for itself* whether th employee had been aware of that and therefore whether he could not have been telling the truth in th course of a disciplinary hearing when he said otherwise. That was not a legitimate approach. The *Burche* test was not simply *a* permissible approach to allegations of misconduct; it was the *only* permissibl approach. In deciding for itself whether the employee had been guilty of misconduct, the employmer tribunal apparently fell into error. The position could have been otherwise if what the tribunal had bee doing was to reach its own conclusion on the basis of material before the employer in order to asses whether the employer's conclusion that the employee was guilty of misconduct was reasonable. But it wa said by the employer that, whatever the issues for the employer at the disciplinary hearing, before th employment tribunal the only point taken on behalf of the employee was that in view of his very lon service with the employer the ultimate disciplinary sanction of dismissal was too harsh, and it had *not* bee contended that it had not been open to the employer reasonably to conclude that the employee had no been entitled to a day's holiday. If that was correct, any error made by the tribunal could not be said t have infected the tribunal's view as to whether dismissal was within the range of responses open to reasonable employer. The tribunal had not substituted its own view for that of the employer on th question of the appropriate sanction. Thus, the outcome of the appeal depended on whether it had bee contended on behalf of the employee in the employment tribunal that it had not been reasonably open t the employer to conclude that he had been aware that he was not entitled to take the day's holiday. Th appeal tribunal had decided to take the course of adjourning further hearing of the appeal so that inquirie could be made of the employment tribunal as to whether that contention had been made on behalf of th employee. The tribunal's recollection would not be decisive, but would be regarded as just one of th factors to be taken into account. That course would not have been necessary if the employment tribuna had clearly identified the issues which it had had to decide.

Rajpra v Timet UK Ltd; 21 March 2003; EAT/827/02
EAT: Keith J, Mr D Norman and Mrs R A Vickers

VICTIMISATION

An employment tribunal upheld an employee's complaints of, inter alia, race discrimination an victimisation made against his employer and two individual officers of the employer.

JUDGE McMULLEN QC, dismissing an appeal by the respondents, said that the employmen tribunal's findings of direct race discrimination and victimisation were strong because they were cogentl organised and argued, so that one could see clearly the thinking behind each finding and the process o reasoning from which the tribunal moved from primary fact to inference to conclusion. The tribunal ha directed itself according to the relevant provisions of the Race Relations Act 1976 and the relevan authorities. At the forefront of the respondents' complaints about the tribunal's decision was its decisio on victimisation. The employee had contended that two protected acts within the meaning of section 2 o the 1976 Act had been taken: the issuing of a grievance and the service of a statutory race relation questionnaire. In *Waters v Comr of Police of the Metropolis* [1997] ICR 1073, 1097 Waite LJ considered submission based on section 4(1)(d) (the relevant subsection for the purposes of the present appeal) an rejected a submission that a broad approach was to be taken to protected acts. It seemed to the appea tribunal that for a complaint of a protected act to fall within the definition there had to be some way t

ich the discriminator could know that an assertion had been made which was linked to discrimination him, contrary to section 6(2). The employee's grievance letter raised serious dissatisfaction with the lividual officers; it did not in any sense reflect a complaint which related to race. It was a complaint of fair treatment of him as an employee, making no specific or even general complaint based on race. It uld not be said that the officers could or should have divined that the complaint was of race crimination. Just because an employer had treated unfairly one of its employees who was black did not an that it had done so because he was black, otherwise the rule in *Glasgow City Council v Zafar* [1998] R 120 would be given no purpose. An employer was equally capable of treating unfairly persons from a nge of ethnic groups; it was contrary to the anti-discrimination statute when such action was on racial ounds or, in a case of victimisation, was because of the discriminator's knowledge that the person ncerned had committed a protected act. The first protected act relied on—the grievance—did not fall thin section 2(1)(d); but it was accepted that the questionnaire was a protected act. As a matter of lity, the questionnaire was followed by steps directly targeted at the employee which involved his ection for redundancy. The causal connection between the two was made by the employment tribunal; at was a matter of fact for that tribunal. The appeal tribunal saw no reason to interfere with it, based as was on the extremely powerful infrastructure of findings and reasons. As to the substantive crimination, the overall impression which the tribunal was enjoined to make—see *Anya v University of xford* [2001] ICR 847—was one which emerged clearly from its reasoning. It found a string of incidents er a short period which were in themselves discriminatory and which, as a whole, also created a full ndscape of discrimination. It could not be said that the tribunal's findings were findings which no asonable tribunal could have made.

The Prince's Trust v Beckford; 6 February 2003; EAT/303/01
EAT: Judge McMullen QC, Ms K Bilgan and Mr D J Hodgkins

ANNUAL LEAVE

On a claim by a police officer, pursuant to his entitlement to annual leave under regulation 13 of th Working Time Regulations 1998, for holiday pay outstanding at the time of his retirement, an employmen tribunal found that he could not rely on his actual holiday year which commenced on 1 April because, as h was not employed under a contract of employment, there was no "relevant agreement" which provided fo a specified date within the meaning of regulation 13(3)(a) and that his annual leave year had to be taken t have commenced on 1 October by reason of regulation 13(3)(b)(i).

JUDGE PETER CLARK, allowing an appeal by the applicant, said that the special position of polic constables under the Working Time Regulations 1998 was regulated by regulation 41(1) which provide that for the purposes of the Regulations the holding of the office of constable was to be treated a employment under a worker's contract. As the chairman found, the applicant's terms and conditions o service were determined by the provisions of the Police Regulations 1995, under which his "leave year" wa the period of 12 months beginning on such date as might from time to time be determined by the polic authority, and, by standing order, the annual leave year was from 1 April. Applying the deeming provisio in regulation 41(1), the term as to the applicant's leave year contained in his conditions of service had to b treated as a term of his employment under a worker's contract. Regulation 41(1) was not concerned onl with deeming a police constable to be a "worker" for the purposes of the Regulations; it was clear that constable's office was to be treated as employment under a worker's contract. In the present case that wa a contract of employment, applying the first limb of the definition of worker's contract in regulation 2(1 By regulation 13(3) a worker's leave year began (a) on such date as might be provided for in a relevan agreement, or (b) where there was no such applicable provision, 1 October. The issue was whether th applicant could point to a relevant agreement which determined a date for the beginning of his leave yea The respondent submitted that it was a prerequisite of the definition of "relevant agreement" that there wa an agreement between the parties, whereas the Police Regulations did not constitute such an agreement The standing order could be varied unilaterally by the chief constable. The appeal tribunal preferred th applicant's submission. A contract of employment was by definition an agreement which was legall enforceable between the parties to it. The applicant was deemed to be employed under a worker contract. There was a deemed agreement between the parties. It was common ground that the provisio relied on by the applicant was legally enforceable. It followed that the tribunal fell into error in findin simply that the applicant had no contract of employment. He was deemed to be employed under such contract by virtue of regulation 41(1) and there was a relevant agreement under which the start date was April. The fall back date under regulation 13(3)(b) was not engaged.

Hyman v Chief Constable of South Wales Police; 8 April 2003; EAT/892/02
EAT: Judge Peter Clark, Mr C Edwards and Mrs M McArthur

PRACTICE

An employment tribunal chairman, sitting alone, heard and dismissed complaints by an applicant o breach of contract and unauthorised deduction of wages, without intimating to the parties that she wa exercising her discretion to sit alone and without reference to the matters set out in section 4(5) of th Employment Tribunals Act 1996.

LORD JOHNSTON, allowing an appeal by the applicant, said that the applicant submitted that where, on the face of it, at least one of the provisions of section 4(5) appeared to apply, there was a duty o the chairman to exercise a discretion and so to intimate to the parties. The respondents submitted that properly understood, the discretion that was plainly vested in the chairman under subsection (5) could b exercised at any time and must have been exercised when the original intimation of the hearing stated tha the chairman would be sitting alone. They further submitted that, in any event, by proceeding with th case the applicant had either tacitly accepted the position or waived the right to object. The appeal tribuna did not consider that waiver or tacit acceptance could apply in respect of a duty that was mandatoril imposed on the chairman in relation to the exercise of a discretion. The word "proceedings" in section 4(5 meant the actual hearing and, accordingly, it was incumbent on a chairman intending to sit alone when provisions of that subsection might apply to raise the matter with the parties at the beginning of the hearin and, accordingly, exercise his discretion if he continued to sit alone. Since there was no indication of an discretion whatever having been exercised, following the route taken by the Employment Appeal Tribuna in *Harman v Town and Country Veterinary Group* (unreported) 30 May 2001, EAT/71/01, the decisio would be quashed and the matter remitted for rehearing before a fresh tribunal, in the expectation that th chairman of that tribunal, if intending to sit alone, would exercise his or her discretion and give reason therefor at the start of the proceedings.

Dressel v Partnership Housing Ltd; 19 March 2003; EATS/48/02
EAT(Sc): Lord Johnston, Miss J A Gaskell and Mr R P Thomson

ART-TIME WORKER

An employment tribunal upheld claims by an employee that she had been unfairly dismissed and that e had been discriminated against as a part-time worker, contrary to regulation 5(1)(b) of the Part-time Vorkers (Prevention of Less Favourable Treatment) Regulations 2000.

JUDGE PROPHET, dismissing an appeal by the employers, said that the employers submitted that gal analysis of what was required to constitute a breach under regulation 5 involved a four-stage process:) what was the treatment complained of; (2) was that treatment less favourable than that of a comparable ll-time worker; (3) was the less favourable treatment on the ground that the worker was a part-time orker; (4) if so, was it justified? They submitted that the employment tribunal had failed correctly to nalyse the first three stages, giving far too much emphasis to justification; that a correct analysis would ave indicated that the applicant was dismissed not because she was a part-time worker but because the nployers had made a commercial decision to have three full-time employees as accounting assistants; us, she was dismissed on the ground of redundancy. The employment tribunal might not have worked rough the stages with such precision; it was, however, apparent that they were fully cognisant with the eatment given by the employers to the applicant and were satisfied that she had thereby been treated less vourably than the comparable full-time accounting assistants. They stated in their reasons that the pplicant was dismissed simply because she would agree to work only 32·5 rather than 37·5 hours. learly, therefore, they answered the third stage question in the affirmative, and, on the facts they found, at could not be a perverse conclusion. In interpreting the 2000 Regulations so as to give effect to their oviding protection for part-time workers, an employment tribunal had to see what happened in its full ntext. Thus, in the present case "the treatment" incorporated the continued pressure on the applicant to ork full time, that she would have to work full time if she wished to remain in employment, the selection rocess devised by the employers as it applied to the applicant (which meant her dismissal became evitable) and, finally, her dismissal. As to justification, the tribunal recognised that it was for the nployers to make a commercial decision that they were overstaffed, but the tribunal were entitled to look all the circumstances, including that the applicant was a part-time worker who would be only five hours ort of full-time service. Turning to unfair dismissal, the appeal tribunal accepted that, if the employment ibunal's reasoning was that a breach of the 2000 Regulations meant that the applicant was thereby tomatically unfairly dismissed, that would be an error of law. However, the appeal tribunal was tisfied from a full reading of the reasons that they did not fall into that error.

Hendrickson Europe Ltd v Pipe; 15 April 2003; EAT/272/02
EAT: Judge Prophet, Mrs R Chapman and Mr C Edwards

IME LIMIT

An applicant employee, who was suffering from ill health and had recently had an operation, posted a otice of appeal from a decision of an employment tribunal, together with the requisite documents, before e expiry of the 42-day period for appealing prescribed by rule 3 of the Employment Appeal Tribunal ules 1993, but it was received by the Employment Appeal Tribunal one day out of time. He also handed , within time, a copy notice of appeal, but it was not accompanied by the tribunal's extended written asons as required by rule 3(1)(c). The Registrar of the Employment Appeal Tribunal, taking account of e fact that the appeal tribunal had previously applied the rules relating to receipt of an appeal with roper documentation in a lax manner so that the appellant had a legitimate expectation that the appeal ould be accepted, granted the applicant an extension of time on the ground that an exceptional reason ad been shown why the appeal could not have been presented within time.

BURTON J (PRESIDENT), dismissing an appeal by the respondent employers, said that, plainly, what le Registrar had been referring to was not any legitimate expectation on the part the present applicant, but the fact that there had been a lax practice at the Employment Appeal Tribunal, though certainly not in lation to the lodging of a notice of appeal simpliciter within the 42 days. A different practice had berated, however, in relation to situations such as the present where a notice of appeal had been put in in me but it had not been accompanied by the necessary documents—in the present case, the extended asons. That failure rendered the notice of appeal invalid. However, it had been regarded leniently and xtensions of time granted. That had to stop, and certainly since the new Practice Direction [*Practice irection* (*Employment Appeal Tribunal: Procedure*) [2002] ICR 122] there had been no application for n extension of time on that basis. The present case signalled the end of any laxity in that regard. The resent case was, however, an appropriate one, not only because of the particular compassionate rcumstances, but because it would be used as a signal of the end of the previous practice, for the grant, in ie exercise of the Registrar's decision, of what was only a one-day extension of time. The respondent nployers had raised, but not pursued, a subordinate point on paragraph 3(2) and (3) of the Practice irection, asserting that, contrary to paragraph 3(2) the application for an extension of time had not been ade at the same time as the notice of appeal. It was right that there should be such a paragraph in the ractice Direction, because in the normal course—that an appellant was out of time and knew that—there ad to be an obligation to serve simultaneously the notice of appeal and an explanation for its delay. But aragraph 3(2) could not be intended to be wholly prescriptive and exclusive. That could be seen from the ery existence of paragraph 3(3), which would be unnecessary if paragraph 3(2) were all governing. There

would, no doubt, be cases, such as the present, where, when the notice of appeal was despatched, it was not appreciated that it would be out of time, and in those circumstances it was not practicable for it to be accompanied by an application for an extension of time. In such cases, when it was appreciated that the notice of appeal had been lodged out of time, it would then become appropriate as speedily as possible to follow it up with an explanation in accordance with paragraph 3(2) of the Practice Direction.

Kanapathiar v Harrow London Borough Council; 25 February 2003; EAT/1281/02
EAT: Burton J (President) (heard in chambers and judgment given in open court)

PPEAL

On an appeal by an applicant against the dismissal by an employment tribunal of her complaints of rongful dismissal, unfair dismissal and failure to pay wages, the appeal tribunal gave directions requiring e applicant to lodge an affidavit giving details of alleged bias or improper conduct on the part of the nployment tribunal, in default of which certain grounds of appeal were to be dismissed.

JUDGE PETER CLARK, dismissing an application by the applicant to revoke the requirement to lodge affidavit, said that the applicant submitted that her grounds of appeal did not raise allegations of *bias* ainst the employment tribunal and no requirement for an affidavit arose. Bias not was alleged, but the ounds of appeal did allege procedural irregularity amounting to a breach of her right to a fair trial and isconduct on the part of the chairman in recording an agreement between the parties which was ompletely false". In those circumstances it was right to adopt the affidavit procedure. Like any court or bunal the Employment Appeal Tribunal's orders were made to be complied with. In the case of non mpliance, by rule 26 of the Employment Appeal Tribunal Rules 1993, the appeal tribunal could order at the party in default should be debarred from taking any further part in the proceedings or make such her order as it thought just. That included the power to strike out all or any grounds of appeal. The ocedure contained in *Practice Direction (EAT: Procedure)* [2003] ICR 122, para 11 was required to allow e appeal tribunal to determine as a fact what had taken place below where bias, misconduct or procedural regularity was alleged; that necessarily extended the time for determining the appeal. The approach in *berts v United Friendly Insurance plc* (unreported), 13 June 1996 to accept the word of the chairman as what had happened below had not survived the guidance given by a very strong Court of Appeal in *ckabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451, applied in *Facey v Midas Retail Security Ltd* 001] ICR 287, 301, para 35. If the affidavit procedure was to be followed it was essential that parties mply with all directions given. Otherwise unnecessary delay would follow. The applicant further bmitted that her case fell within CPR, Part 2, PD.B, para 7A(1), which provided: "A deputy High Court dge . . . may not try—(1) a case in a claim made in respect of a judicial act under the Human Rights Act 98 . . ." In the view of the appeal tribunal, para 7A was concerned with claims under section 7(1)(a) of the uman Rights Act 1998 against the appropriate authority. In the present appeal the applicant was not inging a claim against the employment tribunal under that Act, but was seeking to rely on her rights under ticle 6(1) of Schedule 1 to the Act in the appeal (section 7(1)(b)). Thus, circuit judges, who coincidentally so sat in the High Court, were not prevented from sitting on the Employment Appeal Tribunal, being thorised to do so under section 24 of the Employment Tribunals Act 1996, to consider a point raised by a rty in the appeal in accordance with section 7(1)(b) of the 1998 Act. The applicant had also challenged e practice of ex parte preliminary hearings, submitting that it amounted to a requirement of permission to peal. That was not accepted. The procedure was not akin to the permission system elsewhere, since an der dismissing an appeal, following a hearing, at the preliminary stage was then subject to appeal, with rmission, to the Court of Appeal. Section 21(1) of the 1996 Act limited the appeal tribunal's jurisdiction hearing appeals on a question of law only. If an appeal was dismissed at the preliminary hearing stage it ould be on the basis that no error of law was made out, and, if that judgment was wrong, it could be rrected by the Court of Appeal. While the appeal tribunal continued to use the pre-CPR expression "ex rte" in circumstances where the respondent to an appeal had no right of audience at the preliminary aring, save as to directions for the future conduct of the appeal, that procedure, designed to save expense r a respondent in an appeal which ultimately failed, did not exclude written representations by the spondent to which the appellant had every opportunity to respond at the oral preliminary hearing.

Riniker v Waymark Holidays Ltd; 30 April 2003; EAT 61/03
EAT: Judge Peter Clark, Mr P R A Jacques and Miss D Whittingham

JRISDICTION

A complaint by a civilian member of staff at a police station that she had been sexually assaulted by a olice inspector was heard by a disciplinary board, established in accordance with the Police (Discipline) egulations 1985, which consisted of three male commanders. She complained to an employment tribunal at the board had subjected her to sexual harassment in their conduct of that hearing. The employment bunal determined as a preliminary issue that the function of the disciplinary hearing was to arrive at a dicial, and not an administrative, determination and that thereby it enjoyed absolute immunity from mplaints about its conduct of the hearing.

RIMER J, dismissing an appeal by the applicant, said that the question raised by the appeal was hether the disciplinary hearing inquiring into the charge against the inspector constituted proceedings of ribunal enjoying the like absolute privilege as was enjoyed by proceedings before a court. The best guide the resolution of the question was the House of Lords decision in *Trapp v Mackie* [1979] 1 WLR 377, in hich Lord Diplock identified four matters which needed to be considered when deciding on which side of

the line any particular case might fall. The first was that the tribunal had to be one recognised by law. There was no issue about that: the hearing was constituted under the 1985 Regulations. The second matter was the nature of the question into which the tribunal was required to inquire. The issue before the disciplinary hearing was closely analogous to the type of issue which arose in courts of justice. It was in the nature of a trial, under a procedure recognised by law, of a disciplinary charge which could result in a range of punishments from dismissal to a caution. Its nature was capable of resulting in the proceedings enjoying absolute privilege. The third matter was the procedure adopted by the tribunal, and the procedure required to be adopted at the disciplinary hearing was also, in its essentials, akin to that adopted by courts trying civil or criminal cases. The fourth matter was the legal consequence of the conclusion reached by the tribunal as a result of the inquiry. The consequences of a decision of the disciplinary tribunal were either rather close to those of a decision of a court of justice or else were not relevantly distinguishable from the situation in *Trapp*: punishments could be imposed either directly by the board or other officer conducting the hearing, or else on their recommendation. Either way the decision was finally binding on the accused, subject only to any appeal. The essential features of the disciplinary hearing rendered it closely analogous to a judicial proceeding before a court of justice, and the employment tribunal had been correct in their conclusion that the disciplinary hearing enjoyed the same absolute immunity as proceedings before a court of justice. Though the applicant's complaint was not so much about what was said at the disciplinary hearing but about the exclusively male constitution of the board and the failure of the board to control counsel's questions of her in cross-examination, the immunity extended to such complaints. Though the Sex Discrimination Act 1975 said nothing to the effect that tribunals enjoyed such immunity, the rule was a long-standing one of public policy and Parliament could be taken to have been aware of it when enacting the 1975 Act.

Heath v Comr of Police of the Metropolis; 12 May 2003; EAT/454/02
EAT: Rimer J, Mr C Edwards and Miss C Holroyd

TIME LIMIT

A complaint of unfair dismissal, presented by an applicant on 1 June 2001, was held to be out of time where the applicant had accepted, on 2 March 2001, her employers' confirmation that she could retire, on grounds of ill-health, on 28 February 2001.

JUDGE PETER CLARK, dismissing an appeal by the applicant, said that it was acknowledged on behalf of the applicant that *Crank v Her Majesty's Stationery Office* [1985] ICR 1 and *Lambert v Croydon College* [1999] ICR 409 supported the propositions, first, that parties to a contract of employment might agree a retrospective effective date of termination and, secondly, that such agreement was not invalidated by section 203 of the Employment Rights Act 1996. It was, however, submitted that those cases were wrongly decided. Although the Employment Appeal Tribunal was not bound by its previous decisions, in the interests of comity it would normally follow a line of authority that was well settled unless it could be shown that the earlier decisions had been decided without full argument. It had to be assumed that the applicant's contract was terminated by the employers without notice under section 95(1)(a) of the Act. Section 97(1)(b) provided that "in relation to an employee whose contract of employment is terminated without notice" the effective date of termination "means the date on which the termination takes effect". The issue, under section 97(1)(b), was whether as a matter of fact the effective date of termination might be a date retrospectively agreed between the parties. It was submitted that a retrospectively agreed effective date of termination offended the provisions on continuity of employment, in particular section 212(1). It was contended that, on the facts, the applicant's relations with her employers were governed by a contract of employment after 28 February 2001; that the earliest date on which it could be said that the parties had agreed the ending of the contract was 2 March 2001, and the period 28 February to 2 March counted in computing her period of employment by virtue of section 212(1); and that the parties could not abridge that time by agreement, thereby extinguishing a period of continuous employment. The appeal tribunal rejected that submission. If the effective date of termination could be retrospectively agreed that would not offend the continuity provisions, which expressly provided for the effective date of termination as the end date for an employee's period of continuous employment under section 211(1)(b). Where the parties retrospectively agreed the date on which the contract ended that was the effective date of termination. The applicant also relied on section 203 of the 1996 Act, focusing on the words of subsection (1)(a) and submitting that, though the agreed termination date did not exclude the applicant's right to bring an unfair dismissal complaint, it limited that right by reducing the primary limitation period to less than three months. The fallacy in the submission was to *assume* that the true effective date of termination was the date on which the agreement was reached. However, an agreement as to the effective date of termination was no different from the parties agreeing a consensual termination of the contract, which had never been regarded as offending section 203(1). The appeal tribunal had not been persuaded to depart from the principles laid down in *Crank* and *Lambert*. Further, there were practical reasons for continuing to take the line that parties might agree a retrospective effective date of termination, just as they could agree to an extended period of notice. Permission to appeal.

Fitzgerald v University of Kent at Canterbury; 13 May 2003; EAT/474/02
EAT: Judge Peter Clark, Mr A E R Manners and Mr H Singh

OMPENSATION

An employment tribunal upheld complaints of unfair dismissal by employees who had been dismissed llowing the transfer to new owners of the pub where they worked but made no separate award for a ilure to consult in accordance with regulations 10 and 11 of the Transfer of Undertakings (Protection of mployment) Regulations 1981. The tribunal also deducted earnings by one employee from another job ndertaken during and after his employment, when calculating his compensatory award.

JUDGE BIRTLES, allowing an appeal by the latter employee, said that, on the first matter, the nployees had to rely on regulation 11(4)(a) of the 1981 Regulations, and the issue, therefore, was what at provision meant. It was argued that it required the employment tribunal to do two things: first, to ake a declaration that there had been a breach of the consultation procedures; and, secondly, to award ppropriate compensation as specified in regulation 11(11). The respondent transferees argued that the nguage of regulation 11(4) was quite clear: the tribunal "shall"—and therefore must—make a eclaration, but it "may" award compensation—it was not required to do so. In the judgment of the ppeal tribunal, that was correct. Parliament was to be taken to be well aware of the difference between e mandatory "shall" and the permissive "may". The use of the disjunctive "or" separating paragraph (a) om paragraph (b) of regulation 11(4) did not alter that conclusion. The employment tribunal was fully ntitled on the facts not to make an award of appropriate compensation under regulation 11(4)(a) if it ought it could do justice to the case by taking it into account in its award of the compensatory element of smissal. There was no error of law. The final ground of appeal was that the tribunal had erred in law in king into account the employee's income from his other job in calculating his award. The loss suffered by e employee, for the purposes of section 123(1) of the Employment Rights Act 1996, was the loss of his eekly wage paid by the transferor. He did not lose the wages paid by his other job. That payment and at employment had nothing to do with any respondent. It predated the dismissal and continued after it; was separate employment. Furthermore, the common law duty to mitigate loss under section 123(4) ould not operate so as to enable a tribunal to reduce compensation payable under section 123(1) in the resent circumstances. The duty to mitigate loss applied only to employment which commenced after smissal. To do otherwise would be to unjustly reward an employer for dismissing an employee who had e initiative and energy to have alternative employment which predated dismissal. That could not be just nd equitable in all the circumstances, and the employment tribunal had made an error of law in adopting at approach.

Mansi v Warne; 20 May 2003; EAT/853/02
EAT: Judge Birtles, Mr A D Tuffin and Miss D Whittingham

ISABILITY DISCRIMINATION

An employee suffered an injury to his hand while at work, as a carpenter, and, though thereby disabled r the purposes of the Disability Discrimination Act 1995, he wanted to return to work and requested a ial period to demonstrate that he was able to perform his duties. The employers carried out a controlled sessment of the employee involving a series of typical tasks, but had doubts about his safety and he was smissed. An employment tribunal upheld a complaint by the employee of disability discrimination on e ground that by refusing to allow the employee to return to work for a trial period to see what he could the employers had failed in their duty to make adjustments under section 6 of the Act and that the ilure was not justified.

MR COMMISSIONER HOWELL QC, allowing an appeal by the employers, said that there were two parate and distinct questions to be asked under sections 5 and 6 of the 1995 Act when a complaint was ade that a failure to make reasonable adjustments in accordance with section 6 had resulted in scrimination, so that the detriment to which it gave rise became unlawful conduct on the part of an nployer of which complaint might be made under section 4. On the first question under section 6(1) the ssessment of what steps it was reasonable for an employer to have taken in order to comply with its duty, nd whether it had failed, was to be determined objectively according to the tribunal's own view of what as or was not reasonable in the circumstances of a particular case. Having established that there had een such a failure, a tribunal was then required by section 5 to go on and consider the *separate* question nder section 5(2)(b) of whether the employer "cannot show that his failure to comply with that duty is stified". Only if that separate condition was also met could a finding of discrimination for the purposes f section 5 be made. That the language used in section 5(2)(b) did require that separate question to be ddressed, even in the case of an established failure to do what the tribunal considered reasonable under ection 6, was apparent from *Prison Service v Beart* [2003] ICR 1068 and from the Court of Appeal's onsideration of the identical language in section 5(1)(b) in *Post Office v Jones* [2001] ICR 805. Under that ording the question of whether the employer could show the defence of justification was not only a parate one from that of reasonableness under section 6 but one involving a different and (for the

employer) less onerous standard. In particular, the effect of subsections (3) and (4) meant that all that wa to be addressed was whether the reason put forward by the employer as justification was (a) material an (b) substantial. Provided those not very demanding thresholds were met, it was not for the employmen tribunal to substitute its own view on whether it considered that showed a reasonable justification for th treatment or failure in question. The interpretation in *Jones* had to be regarded as binding also for th purposes of section 5(2)(b). On that footing the tribunal's expressed reasons embodied a materia misdirection in that consideration of whether there had been a failure on the part of the employers to tak reasonable steps under section 6 and whether the defence of justification under section 5(2)(b) had bee established was regarded as depending on the *same* circumstances and for practical purposes as the sam inquiry, instead of having to be differentiated with two different tests to be applied. It was apparent tha the tribunal's conclusions depended on their own assessment of what *they* considered it reasonable for th employers to do, and their reasons contained nothing to show that they regarded justification as depending on different questions and a different test or that they were directing themselves to the less stringen standard required by the wording of section 5(2)(b) as laid down in *Jones*.

Royal National Theatre Board Ltd v Collins; 29 April 2003; EAT/642/02
EAT: Mr Commissioner Howell QC, Mr J R Crosby and Mr A D Tuffin

UNFAIR DISMISSAL

An employment tribunal upheld complaints of unfair dismissal made by employees complaining of a failure by their employer to consult with them prior to redundancy but made no award of compensation on the basis that the employees would have been dismissed in any event.

LORD JOHNSTON, allowing an appeal by the employees, said that the employees argued that the tribunal's decision to assess the likelihood of dismissal in any event at 100% was illogical, since it failed to give any effect to what might have been the result of a consultation process if it had been properly carried out. They submitted that the failure of the employer to embark on a fair consultation process was a substantive one, consequently, having an effect inasmuch that there was a denial of opportunity and it could not be said that if that opportunity had been given a different result would not have been achieved. The employer submitted that the issue was one of fact to be determined by the employment tribunal on the evidence. The appeal tribunal agreed that, on the evidence before them, the tribunal were entitled, having determined the issue of fairness, to conclude nevertheless that the employer would be bound to effect the redundancies in any event. However, the appeal tribunal was concerned that the employment tribunal did not consider the question of whether or not the employees' period of employment might have been extended to some extent if the consultation process had been properly carried out. Accordingly, it was appropriate to remit the matter to the same tribunal for them to consider, on the facts they had found proved, whether or not the consultation process might have extended the employment period and, if so, to what extent; alternatively, whether proper consultation would have had the result that the employees would have sought other employment at an earlier date, which might also reflect on the issue of compensation. If the tribunal did so conclude, compensation would be awardable in respect of the relevant loss of weekly pay. If the tribunal determined that the same date would in fact have been achieved because of the attitude of the employer, no compensation would be awardable.

Jardine v Cameron Linn Ltd; 5 June 2003; EATS/50/02
EAT(Sc): Lord Johnston, Mr A G McQuaker and Mr M G Smith

REACH OF CONTRACT

An employee, who was transferred from typing to clerical duties and lost her typing proficiency yments, made a complaint of breach of contract before her employment terminated, on grounds of ill-alth. The employment tribunal held that it had no jurisdiction to hear the claim, as it had not been esented within the three-month period beginning with the effective date of termination of the contract, as escribed by article 7(a) of the Employment Tribunals Extension of Jurisdiction (England and Wales) rder 1994. The tribunal also considered whether the claim could be treated as a claim for unlawful duction of wages under section 13(1) of the Employment Rights Act 1996, but concluded that it could t as it "was plainly and unambiguously expressed as being for breach of contract only".

JUDGE BURKE QC, allowing an appeal by the employee, said that, if the employee's claim was a im in respect of wrongful deduction under Part II of the 1996 Act, it was at least plainly arguable that it ated to a series of such deductions and therefore would have been in time, because it had been presented fore the end of the period of three months beginning with the last deduction. Therefore, if such a claim d been before the tribunal, it would have been open to it to find it had jurisdiction. The appeal tribunal reed with what was said by the appeal tribunal in *Miller Bros & F P Butler Ltd v Johnston* [2002] ICR 4, 749–750, para 26, and that one must not strive to find jurisdiction by an artifice where jurisdiction did t exist. On behalf of the employee it was submitted that the employment tribunal had erred in ncluding that her claim could not properly be viewed as a wrongful deduction claim. It was significant at the employers conceded that, if the employee had been compulsorily transferred, she would have had a ntractual entitlement to the proficiency payments, and it was submitted that in their notice of pearance the employers had responded directly to that, by setting out in considerable detail the facts on ich they based their case that she had transferred voluntarily. The appeal tribunal accepted that the two uses of action or heads of claim were different and that there might be many situations in which a breach contract claim could not, on any view, be said to be also a wrongful deduction claim. However, in cases which the employee asserted that she should have been paid moneys to which she was contractually titled, the claim could be put both in debt, as a claim for moneys due that had not been paid, because ere had been a wrongful deduction, and in damages as moneys lost by reason of the employer's breach of ntract in failing to pay, which fell within the 1994 Order. Any fair reading of the employee's originating plication could only tell the reader that she was asserting that she was contractually entitled to the yments she sought but had not received. The question the tribunal needed to pose was whether in bstance the claim was not only one for breach of contract but also for unlawful deduction of wages. Had employment tribunal properly directed itself to that question, it could only have answered it in the firmative. The claim did contain a claim for wrongful deduction and the employment tribunal erred in w in dismissing it on the basis that it consisted only of a claim under the 1994 Order, as to which, mittedly, there was no jurisdiction.

Whitmore v Inland Revenue Comrs; 1 April 2003; EAT/727/02
EAT: Judge Burke QC, Mr K Edmondson and Mr D S Smith

MPLOYER'S INSOLVENCY

The applicant employees were dismissed when their employer ceased trading. The Secretary of State Trade and Industry refused their applications for redundancy and other termination payments, and an ployment tribunal chairman, relying on a statement by a licensed insolvency practitioner, found that the ployer was insolvent within the meaning of section 183 of the Employment Rights Act 1996 and made order in favour of the applicants.

JUDGE PETER CLARK, allowing an appeal by the Secretary of State, said that the issue on the appeal s whether the employer was insolvent within the meaning of section 183 of the 1996 Act. Where an ployee was dismissed by reason of redundancy and did not receive a redundancy payment from his ployer he could recover payment from the Secretary of State in the circumstances prescribed by section 6(1) of the Act. Insolvency was defined in section 183, and those provisions had been the subject of nsideration by the Employment Appeal Tribunal in number of cases. The relevant principle to be derived m those cases was that it was for the employee to establish that the statutory definition of insolvency s satisfied. It was not enough simply that the employer had ceased trading, could not pay his debts or s otherwise in some form of financial difficulty. The Secretary of State had disputed before the ployment tribunal that the employer was insolvent within the meaning of section 183. In his extended sons the employment tribunal chairman purportedly found as a fact that the employer was insolvent. e licensed insolvency practitioner had said so. That was simply not enough. The word "insolvency" had ferent meanings in different contexts. Precisely what the practitioner meant by that expression was clear. What was clear was that the practitioner did not mean that the employer was insolvent within the aning of section 183, because, in reply to questions from the Department of Trade and Industry, the

practitioner answered that the employer had not been adjudged bankrupt and had made no composition o arrangement with his creditors. The appeal tribunal did not, however, need to rest its decision on tha exchange of letters, because it was satisfied that there was no evidence before the chairman that either o the limbs of section 183(2)(a)(i) had been satisfied. Accordingly, the finding that the employer wa insolvent for present purposes could not stand.

Secretary of State for Trade and Industry v Key; 7 May 2003; EAT/1356/01
EAT: Judge Peter Clark, Ms G Mills and Mr J C Shrigley

EMPLOYMENT APPEAL TRIBUNAL

An appeal from an employment tribunal was dismissed by the Registrar of the Employment Appea Tribunal for failure by the appellants to comply with an order to serve further and better particulars o their notice of appeal which had been made "on paper" and sent by separate letter when the appeal wa listed for preliminary hearing.

BURTON J (PRESIDENT), allowing an appeal by the appellants, said that it seemed that the lette enclosing the order for further particulars was never received by the appellants, and so they did not compl with it, though they complied with other obligations and filed a skeleton argument. An order striking ou an appeal by virtue of default was a more or less administrative order, but it had very considerabl consequences. Unless an order specifically stated that, on failure to comply, the appeal would be dismisse without further notice to the relevant party, there should always be such notice, albeit by reference to very short time scale, to give the party whose appeal was about to be dismissed the opportunity to mak representations. Accordingly, save in the case of an order specifically indicating that no further notic would be given to either party, it was ordinarily appropriate for a judgment in default not to be entere where it was alleged that there had been a failure to comply, without at least checking that the party i question did receive notice of the order. In the present case neither the Registrar nor the respondent to th appeal knew that the appellants had not received the order in question when the order dismissing th appeal was made. When the appellants received the order dismissing the appeal they made an applicatio under rule 33 of the Employment Appeal Tribunal Rules 2001. That appeared entirely appropriate, as rul 33 would apply just as much to a decision made on behalf of the appeal tribunal as to a decision of the ful tribunal. In any event the Registrar did not entertain a review under rule 33, but treated the appellants application as an appeal against her order. Hence the present appeal which had plainly incurred som expenditure of costs on both sides. Where there was an application for a review which was capable o being dealt with "on paper", that course ought ordinarily to be followed, rather than listing inter partes hearing by way of appeal. Since no fault could be ascribed to the appellants, who otherwise acte diligently in accordance to what they understood to be their obligations and at the earliest opportunity applied for a review, the appeal would be allowed.

Baker & Co v Marenah; 11 June 2003; EAT/77/03
EAT: Burton J (President) (as in chambers)

TEACHER

A teacher was given notice that her employment would terminate, on ill-health grounds, on 30 Apri 2000, by a letter from the local education authority which she received on 7 February 2000, following meeting on 3 February of an appeal committee of the governing body of the school where she worked. An employment tribunal dismissed her claims of unfair dismissal and breach of contract.

JUDGE PROPHET, allowing an appeal by the applicant, said that there was no evidence which indicated that there had been a specific notification in writing by the governing body to the local educatio authority of the governing body's determination and the reasons for it, as was required by the Schoo Standards and Framework Act 1998, Schedule 16, paragraph 25. It could not be accepted tha subsequently circulated minutes of the appeal hearing constituted compliance with the statutory procedure. It was difficult to accept that the local authority had been in a position to send the terminatio notice when it did. However, since both parties accepted the fact of the applicant's dismissal, the questio was whether she had received such notice as she was entitled to under her contract. It was common groun that she was on the maximum of 12 weeks for statutory notice purposes and that a notice period under written notice did not include the day it was received. Thus, the period would begin on 8 February an extend to 1 May 2000, and it was a breach of the applicant's contract for notice to end on 30 April. In th usual way such breach would have little practical effect, but in the case of a teacher special considerati had to be given to the contractual requirement which on the face of it required that notices had to end o one of three specific days. The appeal tribunal accepted the submissions on behalf of the applicant that th effect of the statutory requirement was to modify the contractual terms to substitute 12 weeks for two months, with the requirement for a proper notice to expire on one of the three specific dates remaining intact. Thus, the only proper notice which the applicant could have received on 7 February 2000 was on expiring on 31 August 2000. Common sense suggested that weight should be given to the importance o notices relating to teachers ending at the end of school terms. The employer urged the appeal tribunal t

d, as the employment tribunal had, that the applicant received oral notice through her representative at e appeal hearing on 3 February 2000, or at least by communication prior to 7 February. Employment v had always stressed the importance of the fact of dismissal being properly communicated to the nployee. It should not arise by inference. Paragraph 25 of Schedule 16 to the 1998 Act made it clear that e local authority representative had been in no position to give notice to the applicant, even if she had en at the hearing on 3 February, because the required written notification by the governing body to the cal authority had not been given. Notwithstanding the inevitability of the statutory process, notice to the plicant terminating her contract had to been given directly to her by the local authority, and that had curred at the earliest on 7 February 2000. Consequently there was a breach of contract. The conclusions ached on the present appeal were essentially based on the particular circumstances of the applicant's sition, but all education authorities had to be aware that there were strict statutory requirements to llow where the dismissal of a teacher was involved.

Hughes v Governing Body of Archers Court School; 14 January 2003; EAT/1444/01
EAT: Judge Prophet, Mr S M Springer and Mr R N Straker

DISCLOSURE

An employment tribunal upheld a refusal by a respondent local authority to disclose document relating to, inter alia, the applicant's unfair dismissal complaint, relying on section 49(1) of the Audi Commission Act 1998, which prohibited disclosure of documents obtained by the district auditor unles the person to whom the information related consented.

BURTON J (PRESIDENT), allowing an appeal by the applicant, said that section 49 of the 1998 Ac did not have to be construed in the draconian way in which the employment tribunal chairman ha construed it. The phrase "No information . . . obtained by the [Audit] Commission or an auditor . . . shal be disclosed" in that section related to (1) documents created by the auditor from information, such a transcripts or notes of, or statements made or drawn up by the auditor or his staff from, informatio supplied by, or meetings held with, informants, or memoranda or documents prepared by the auditor or hi staff resulting from such information or meetings or communications; and (2) documents created by othe for the purpose of submission to the auditor or the Commission. Thus, for example, if a would-b informant prepared a statement, created a memo, sent a letter or e-mail, or caused or permitted a lawyer t do so on his behalf, then that document would fall within section 49. In order to construe section 4 compatibly with the Human Rights Act 1998, and in particular with the rights of a litigant in civi proceedings under article 6 of the Convention, such preclusion did not extend to documents the disclosur of which was not otherwise precluded by some privilege but which happened to have been supplied to th auditor, but originals or copies of which *remained* in the possession, custody or power of the person wh supplied them to the auditor, from which person disclosure or production was then properly sought. Suc documents could not be cloaked with a privilege from production simply because they happened to hav been provided to the auditor. If they were disclosable in the hands of the person who supplied them to th auditor *before* he supplied them, then they remained subject to disclosure and the simple fact that they o copies might have been supplied to the auditor during an investigation could not render them precluded from disclosure. Only one of the documents fell within the precluded area; the others would be ordered t be disclosed.

Brennan v Bedford Borough Council; 30 June 2003; EAT/317/03
EAT: Burton J (President)

NOTICE PAY

The applicants, who were carpenters, were contractually obliged to carry out work personally unde the direction of the respondents' foremen, mainly using tools provided. They worked under terms whereby the respondent deducted income tax at 18% from their wages and they were responsible to the Inland Revenue for any further tax due. They were paid weekly on the basis of a daily rate but with a bonus for a full week's work. When they were dismissed, they made claims for unlawful deductions in respect of, inte alia, holiday pay and pay in lieu of notice. The employment tribunal chairman found that the applicant were "workers" for the purposes of regulation 16(1) of the Working Time Regulations 1998, and s entitled to holiday pay, but that they were in an intermediate category of workers able to look after thei own interests when it came to holiday pay which was rolled up in the agreed rate of pay; and that they were not "employees" for the purposes of section 86 of the Employment Rights Act 1996, and so not entitled t the notice periods there provided.

JUDGE REID QC, allowing an appeal by the applicants, said that as a matter of economic reality the applicants were employees. They bore no risk; their pay was on a time basis; they were not paid by output While the applicants were accepted by the Inland Revenue scheme, it did not automatically follow that they were not employees. There was no indication that any real thought had been given to their status, and the fact that they were working under the scheme should not be regarded as of any great significance. When all the other factors were taken into account, the relationship between the respondent and the applicants properly analysed, was one of employer and employees. Accordingly, on that basis they were entitled to an award of one week's pay in lieu of notice. If, as the chairman found, the applicants had been workers but not employees, their claim would have failed for want of jurisdiction. When a worker was taken on for an indefinite period to work on a job, it was implicit in his engagement that it would not be terminated without cause except on reasonable notice. What amounted to reasonable notice would depend on the circumstances. The reasonable period of notice in the applicants' case, had they been workers but not employees, would have been one week, and they would have been able to recover an amount equal to one week's wages by way of damages for breach of contract; but that recovery would have had to have been in the county court. In respect of the holiday pay, the appeal tribunal differed from the tribunal chairman. There was no agreement that the applicants' pay included any provision for rolled up holiday pay. The only reference to it was in a document headed "Registration & Safety Card", which was produced after

ey had been engaged and their terms fixed. Even then they were not given copies. It could not vary the eviously agreed terms.

McCarthy v Blue Sword Construction Ltd; 14 July 2003; EAT/223/03
Judge Reid QC, Mr B V Fitzgerald and Mrs T M Prosser

TRIKING OUT

Prior to the hearing of an unfair dismissal complaint, an employment tribunal received a letter from the plicant employee alleging threatening behaviour by the employer towards him. The tribunal decided to at the letter as an application to debar the employer. When the application came on for hearing the ıployer was not present, as he had not been given notice, and the tribunal found that he had conducted e proceedings in a way that was unreasonable and, pursuant to rule 15 of the Employment Tribunals les of Procedure 2001, struck out his notice of appearance. The tribunal later set the order aside and had urther hearing of the application with the employer present, when it again concluded that the employer's haviour had been unreasonable and ordered the notice of appearance to be struck out. It went on to hear e complaint without allowing the employer to take part in the proceedings and found that the applicant d been unfairly dismissed.

BURTON J (PRESIDENT), allowing an appeal by the employer, said that the course taken by the bunal was inappropriate. Once it was apparent that it was not the employer's fault that he had not ended the first hearing it should have been treated as a nullity and the case restarted. On that basis alone e decision to strike out the notice of appearance could not stand. Two possibilities arose as to the order barring the employer from defending the applicant's unfair dismissal claim: either a rehearing by an ıployment tribunal of the question whether the employer should be debarred from defending the case, or e appeal tribunal reaching its own decision on the debarring application. The power under le 15(2)(d) of the Rules of Procedure only arose if either the tribunal had sent a notice to the relevant rty or he had been given an opportunity to show cause orally by virtue of rule 15(3). Because of the satisfactory nature of the two-part hearing that had occurred in the present case, there would have been very substantial question as to whether it could be said that the employer had been given such an portunity simply by virtue of his having been allowed in to the second part of the hearing, not having ard the first part. But, quite apart from procedural matters, there were questions requiring to be decided a tribunal properly faced with an issue under rule 15(2)(d). First, there had to be a conclusion not nply that a party had behaved unreasonably but that *the proceedings had been conducted* by or on his half unreasonably. It was clear that there had been no such finding by the employment tribunal. It might ll be that, on appropriate facts, a tribunal might find that a threat that unless proceedings were thdrawn some course could be taken amounted to a scandalous method of conducting the proceedings. condly, it was plain from *De Keyser Ltd v Wilson* [2001] IRLR 324 that, in ordinary circumstances, even suming a finding that proceedings had been conducted scandalously, unreasonably or vexatiously, before ere could be a strike out of a notice of appearance, or originating application, there had to be a nclusion as to whether a fair trial was or was not still possible. The reason for that question was that a iking out order was not simply regarded as punishment. Thirdly, once it had been concluded that the oceedings had been conducted in breach of rule 15(2)(d) and that a fair trial was not possible, there still mained the question as to what remedy the tribunal considered appropriate, which was proportionate to conclusion. It was also possible that there could be a remedy, even in the absence of a conclusion that a r trial was no longer possible, which amounted to some kind of punishment, but which, if it did not drive e party from the judgment seat, might still be an appropriate penalty to impose, provided it did not lead debarring the party from the case in its entirety. Fourthly, even if the question of a fair trial was found ainst the party, the question still arose as to consequence. Any tribunal making an order had to ask what e appropriate consequence was. As a result of rule 3(3) a respondent who had not entered an appearance as not entitled to take any part in the proceedings, but that did not prevent the tribunal, pursuant to its se management powers under rule 4 or its powers to regulate its own procedure under rule 15, making propriate and proportionate orders. An option might be to debar a respondent from taking any further rt in the liability hearing but permit him to probe the applicant's case on compensation. Those four steps d not been taken in the present case. Even assuming there was some evidence that there was behaviour the employer which could amount to unreasonable conduct of the proceedings, it was impossible to nclude that a fair trial of the unfair dismissal complaint was not possible or was in any way inhibited by iat had occurred. In those circumstances, it was not appropriate to delay the matter further, and the ıployment tribunal's decisions would be set aside and the unfair dismissal claim remitted for a hearing fore a different tribunal.

Bolch v Chipman; 19 May 2003; EAT/1149 & 1150/02
EAT: Burton J (President), Mr J Hougham and Mr A D Tuffin

RANSFER OF UNDERTAKING

An employment tribunal held that the second respondent, the transferor of a cleaning contract, had led to consult with the applicant employee prior to the transfer, in breach of its duty under

regulation 10 of the Transfer of Undertakings (Protection of Employment) Regulations 1981 and ordered it to pay compensation on the basis that liability had remained with the transferor rather than having passed on transfer to the second respondent, the transferee.

BURTON J (PRESIDENT), allowing an appeal by the transferor, said that the conclusion of the Employment Appeal Tribunal in *Transport & General Workers' Union v McKinnon, J R Haulage Ltd* [2001] ICR 1281 was that liability for a failure to consult did not transfer to a transferee under regulation 5(2) of the 1981 Regulations. The appeal tribunal in that case referred to *Kerry Foods v Crebert Ltd* [2000] ICR 556 and distinguished it. But it was plain that the two decisions were inconsistent. The ordinary practice of the appeal tribunal, given that it was not bound by its own previous decisions, was that it had to find previous decisions of its own heavily persuasive, as uncertainty would be created if it easily departed from its earlier decisions. As a matter of ordinary precedent and practice, the tribunal below would follow the more recent of two inconsistent decisions of the appeal tribunal, provided it was clear that one or other of them was not per incuriam. *McKinnon* and *Kerry Foods* were inconsistent by virtue of a question of approach and a conception of policy. If one looked behind regulation 5 to Council Directive 2001/23/EC, it seemed difficult to see how an obligation of an employer to consult in relation to the potential transfer of a contract of employment was not an obligation "arising from an employment relationship existing on the date of transfer". What appeared to have motivated the appeal tribunal in *McKinnon* was a policy question which caused them to construe regulation 5(2) in order to achieve the best purpose of safeguarding an employee's rights. There was plainly an important balance to be reached. On the one hand it could be said that the best protection for an employee to ensure that he was consulted prior to a transfer was to ensure that the obligation was on and remained with the transferor. On the other hand it could be said that if there was a breach the best way of protecting the employee was to make sure that he was compensated, and, in the ordinary case, the best way was to ensure that the obligation transferred to a transferee who had the business and the assets and was likely to be solvent. Any securing of the position of the innocent transferee could ordinarily be done by its obtaining warranties from the transferor. The present case was allowed to proceed in the light of the two inconsistent decisions. Meanwhile, however, *Alamo Group (Europe) Ltd v Tucker* [2003] ICR 829 was decided by the Employment Appeal Tribunal which carefully considered the two previous decisions and reviewed their inconsistencies, resolving the inconsistency firmly in favour of liability transferring under regulation 5(2). There was no reason to differ from that decision. For the purposes of certainty, it was right that people should know that, subject to any higher court considering the matter, the law was as stated in the *Alamo Group* and *Kerry Foods* cases and not as stated in *McKinnon*.

Blue Diamond Services Ltd v McNeish; 20 May 2003; EAT/1354/01
EAT: Burton J (President), Mr D Norman and Mrs R A Vickers

COMPENSATION

An employment tribunal held that the applicant had been unfairly dismissed as she was about to start maternity leave by reason of her pregnancy and awarded total compensation of £18,050, holding that, after the period of maternity leave, she had taken reasonable steps to find work and that she would have been able to return to equivalent earnings within a period of six months of the hearing.

JUDGE ANSELL, allowing an appeal against quantum by the employer, said that the employer submitted that, when awarding the applicant her past and future losses for the six-month period, the tribunal should have assessed the chances that she would not have returned to that job in any event and cited *Ministry of Defence v Cannock* [1994] ICR 918. There was nothing in the documentation from the tribunal to suggest whether that issue had been raised or whether they considered it. The tribunal also seemed not to have given consideration to *Polkey v A E Dayton Services Ltd* [1988] ICR 142. Though they found it to be a very serious case involving glaring omissions in terms of proper redundancy procedures, it still required a tribunal to go through the process of making assessment as to whether, if proper procedures had been adopted, the applicant would in fact have been selected. The employer should be allowed to raise such important principles, and when the matter was remitted to the tribunal they would have to consider them. The tribunal also appeared to have failed to discount childcare costs when making a comparison between that which the applicant would have earned if she had returned to work and that which she actually did earn. *Cannock* made clear that that was something a tribunal had to do. Also, there was a reference in the papers to a possibility that the applicant had applied for benefits but there was no formal recoupment order and the tribunal should consider that aspect of the matter. A further issue related to what was said to be double counting in respect of allowing loss of earnings from the point of dismissal and also awarding a sum for wrongful dismissal, in other words, failure to give proper notice. The appeal tribunal did not see any conflict in making those two awards. If payment in lieu of notice had been paid, the applicant could have gone out and found another job straight away. The final head of appeal related to the award for injury to feelings of £7,000. In the light of the guidance given in *Vento v Chief Constable of the West Yorkshire Police* [2003] ICR 318, there was no reason to interfere with the tribunal's award. The tribunal were entirely justified in regarding it as a serious case which would fall within the second *Vento* band. The case would be remitted for consideration of the issues identified. The applicant had put in a cross-appeal, but her solicitors appeared thereafter to have done precious little to pursue the matter, though at no stage had they actually withdrawn it, and they had not appeared on the appeal. The employer's solicitors had attempted to separate their costs referable entirely to the cross-appeal, and there would be an award of £350 against the applicant in respect of those costs.

S & B Car Hire Kent Ltd v Wallington; 28 August 2003; EAT/246/03
EAT: Judge Ansell, Mr B R Gibbs and Mrs R A Vickers

COSTS

Following the dismissal of their sex discrimination claims, the applicants were ordered by the employment tribunal to pay costs pursuant to rule 14(1) of the Employment Tribunals Rules of Procedure 2001 on the ground that the conduct of their representative in bringing the proceedings was misconceived.

LORD JOHNSTON, allowing an appeal by the applicants, said that it had to be recognised that rule 14(1) of the 2001 Rules of Procedure amended the previous rule, rule 12 of the Employment Tribunals Rules of Procedure 1993, by adding in the words "or a party's representative" and the phrase "or the bringing or conducting of the proceedings by a party has been misconceived". Thus there had been a fairly radical alteration to the previous rule, in respect of which a certain amount of case law had built up. It also had to be noted that in regulation 2(2) of the Employment Tribunals (Constitution and Rules of Procedure) (Scotland) Regulations 2001 "misconceived" was defined as including "having no reasonable prospect of success". The appeal tribunal did not consider that *Benyon v Scadden* [1999] IRLR 700 was relevant to the present issue as to the proper interpretation of the new rule 14 because of the change in wording. As a matter of statutory construction the insertion of the words "or a party's representative" had to have had a purpose in the mind of the draftsman, and, given the existence of *Benyon* which applied conduct of a representative to any aspect of the old rule, the intention was to restrict the issue of conduct of the representative to the only limb to which it was attached. In other words, it was relevant for a tribunal to consider how a party's representative had conducted the proceedings as part of the question whether the test established by the adverbs in the second branch of the rule [acting "vexatiously, abusively, disruptively or otherwise unreasonably"] had been met. It accordingly followed that it was not relevant to consider the conduct of a representative in relation to the third limb ["the bringing or conducting of the proceedings by a party has been misconceived"]. The proper test in that respect had to be, looking at the matter objectively, whether the applicant's case had any reasonable prospect of success, either at the time of conception or during the course of its currency. The phrase "or conducting of the proceedings" in the third

limb raised a difficulty as a matter of construction, but, properly understood, it must be meant to embrace a notion that, even if a case had reasonable prospects of success at the start, it might develop in such a way that those prospects disappeared. Thus it was possible for the tribunal to consider the issue not only at the time of inception, but also during the currency of the case right up to its conclusion. The question was not directed to issues of fault or blame but simply imposed an objective assessment of all the circumstances of the case. If that approach was correct, it was plain that the employment tribunal misconstrued the test to be applied to the third limb, having not even addressed the issue of no reasonable prospects of success. It was not appropriate to remit the matter for further consideration, given that a decision had been reached, which might cause the tribunal to prejudge the issue if it was being reconsidered, and the decision on costs would be quashed.

Hosie v North Ayrshire Leisure Ltd; 2 October 2003; EATS/13/03
EAT(Sc): Lord Johnston, Miss S B Ayre and Miss A Martin

DISABILITY

An applicant complaining of disability discrimination, in answer to the question "what physical or mental impairment did she suffer from which she claims is the basis of her disability?", replied that she suffered from hypothyroidism and tinnitus. On a preliminary hearing to determine whether the applicant had a disability within the meaning of the Disability Discrimination Act 1995, the employment tribunal stated that the applicant had to establish that her symptoms were attributable to hypothyroidism, but that she had failed to produce sufficient evidence to satisfy them that that was the case, and they dismissed her complaint.

BURTON J (PRESIDENT), allowing an appeal by the applicant, said that the first question the tribunal ought to have addressed was not the cause of any impairment, but simply whether the applicant had an impairment. The applicant submitted that what she was saying was that she had an impairment, namely the physical symptoms of balance impairment, difficulty in climbing stairs, fatigue, etc, and that the tribunal should not have found it determinative of the question as to whether the applicant was disabled that they were satisfied that the symptoms of which she was complaining were not due to hypothyroidism. The appeal tribunal were satisfied that the employment tribunal had not asked or answered sufficient questions. Though, on the evidence before them, the tribunal were entitled to say that the symptoms were not due to hypothyroidism, they did not go on to answer the questions: (1) whether the applicant did have an impairment not caused by hypothyroidism, or (2) whether there was any deduced effect of the hypothyroidism. Simply to give the short answer that the tribunal did give, that the symptoms were not attributable to hypothyroidism, was not the same as saying that the applicant had no physical impairment. The issue of what the cause was of a physical impairment was always going to be of importance, and might lead to the conclusion, if there was no apparent cause, that the impairment was not genuinely a physical one but psychosomatic, or, possibly, to the question of whether there was any likely long term effect in the impairment, but it was not the same question, but a different and only an evidential one. It would be unfortunate if any conclusion to which the appeal tribunal came discouraged the need for an applicant to adduce medical evidence, because without medical evidence it was extremely unlikely that someone who simply asserted that he was having some physical difficulty or other would be able to establish, even if he could support prima facie the existence of some physical impairment, the other requirements of the Act. The matter would be remitted for further consideration by the same tribunal.

MacIver v Capita Business Services Ltd; 16 May 2003; EATS/65/02
EAT(Sc): Burton J (President), Mr A J Ramsden and Miss A Martin

EVIDENCE

An employment tribunal, hearing a complaint of unfair constructive dismissal, rejected an objection by the employers' representative to proposed evidence in chief by the employee alleging that the employers had committed fraud, which had led to his resignation.

BURTON J (PRESIDENT), allowing an interlocutory appeal by the employers against the ruling, said that the test of admissibility was whether the evidence to be given was relevant, but it had to be borne in mind that if evidence was given it would be given in public, there being no apparent availability of a restricted reporting order. Where there was an allegation of fraud or criminal conduct, it had to be proved, albeit on a civil basis, to a higher standard, and certainly had to be fully particularised. In that kind of area there was always, in an appropriate case, the question arising of privilege against self-incrimination, and any party had to be given an adequate opportunity to consider that aspect. Tribunals were subject not only to the ordinary principles of fair play well known to the civil courts, but also to considerations of article 6 of the European Convention on Human Rights. Finally, there was the obligation owed to the court as well as to the parties by advocates as a result of their professional codes of practice. That involved considerations of propriety in relation to the asking of questions. If an allegation was to be made of fraudulent conduct, for example, in cross-examination, clearly an advocate would not dream of putting a derogatory question without some kind of evidential basis in his possession for doing so. If there was no

ch basis, other than reasonable suspicion, it could be done by way of a straightforward question which d not expect the answer "Yes" or "No" and which certainly did not involve, in the framing of it, any legation which made it look as though the advocate asking the question had any information to support If the advocate had information available, then in most cases it ought already to have been disclosed and ught, in any event, to be adduced at some stage so that it could be set against the answers to the question ut and itself tested. That was the more important where the hearsay was strictly not inadmissible as in mployment tribunals. Very new evidence, or at any rate new allegations, that had arisen justified the ppeal tribunal interfering with the discretion of the employment tribunal, to the extent of concluding that ie objection had been well founded, not necessarily as a matter of principle, but certainly on the basis that ich questioning should not have proceeded without further appreciation of its legal, jurisprudential and idential basis. To that extent the tribunal were premature in concluding that it was appropriate to allow ie evidence to come out in chief, rather it would have been appropriate to inquire as to what the nature of ie evidence would be and whether it could ever be admissible and, if so, what it was, then to make a ecision as to the stage at which it would become admissible, if it would be ever so.

Sir Robert McAlpine Ltd v Telford; 13 May 2003; EATS/18/03
EAT(Sc): Burton J (President), Mr M R Sibbald and Mr R P Thomson

DATE OF TERMINATION

On Friday 13 September 2002 an employee faxed a letter to his employer's office, which was received on the fax machine there at 8.21 pm, by which he asserted a repudiatory breach by the employer of his contract of employment and accepted that repudiation "as a resignation, effective forthwith". An employment tribunal found that, although there was no evidence that the letter was read until some time in the following week, the effective date of the employee's dismissal was 13 September and his complaint of unfair dismissal, presented on 13 December 2002, was out of time.

JUDGE RICHARDSON, dismissing an appeal by the employee, said that the employee submitted that: where an employer committed a fundamental breach such that an employee was entitled to terminate his contract, the employee had to elect to terminate the contract and that such an election had to be communicated to the employer and was not effective until it was communicated. It was accepted that communication by fax would suffice for that purpose. The employer submitted that communication by fax outside office hours was sufficient. The appeal tribunal had concluded that the effective date of termination for the purposes of unfair dismissal would not necessarily be the date yielded by an analysis following classical principles of contract law. Often the two dates would be the same, but the scheme of the Employment Rights Act 1996 was in certain respects simpler and more straightforward. Subtle legalities had to take second place to what an employee would commonly understand. If the effective date of termination was the date on which the fax was received in the employer's office, a sensible result was achieved. The date was the date on which the employee, having made his election, communicated it in the clearest terms. As the employment tribunal found, he intended to resign with effect from that date, and no longer considered himself bound from that date. If receipt of the fax was insufficient to fix the date of termination, the employee could not with certainty know what date it was. It might have been as late as 16 September, when the office opened on the Monday. But if an authorised member of staff had read it on the Friday, Saturday or Sunday, the date would be earlier; so the employee could not sensibly rely on the date being later than 13 September. It would reflect the intention and purpose of the 1996 Act, and follow the approach of the Employment Appeal Tribunal in *Robert Cort & Son Ltd v Charman* [1981] ICR 816, to hold that where an employee communicated his immediate acceptance of a repudiation by fax, the effective date of termination was the date of receipt of the fax, not any later date when it was read or acted on.

Potter v R J Temple plc (in liquidation); 18 December 2003; EAT/478/03
EAT: Judge Richardson, Mr P Dawson and Ms N Sutcliffe

PARTIES

An applicant employee made complaints of unfair constructive dismissal, wrongful dismissal and unlawful deduction from wages, naming as the sole respondent the company by whom he had been employed as a director. When the complaints came before the employment tribunal, the company was not present or represented, and the tribunal upheld the applicant's claims. The tribunal formed the view that the company secretary and a co-director had taken concerted action to force the applicant out of the company and took "the unusual course" of making the award against the two individuals as well as the company. The two individuals were subsequently joined as respondents and a review hearing was held at which the tribunal confirmed its original decision, concluding that limiting liability to the corporate employer would be an unduly restrictive interpretation of section 112(4) of the Employment Rights Act 1996 and that on the facts as found the two individuals could not hide behind the corporate structure.

JUDGE PETER CLARK, allowing an appeal by the individual respondents, said that the question was whether the employment tribunal had power to make separate awards against the appellants as well as the company in respect of any or all of the successful claims brought by the applicant. The general statement of the law as to directors' liability in *Halsbury's Laws of England*, vol 7(1), para 616, was that creditors of a company have no remedy for breach of contract by the company against directors, save in cases whereby under the company's memorandum the directors' liability was unlimited; nor were directors liable in negligence save where particular circumstances existed. It was not open to the employment tribunal to find the appellants jointly and severally liable together with the corporate employer, it not being found that they were the applicant's employer. In the case of the claims under the Employment Rights Act 1996 it was absolutely plain that a complainant's redress was against the employer only. In the breach of contract claim, justiciable in the employment tribunal by virtue of section 3(2) of the Employment Tribunals Act 1996 and article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, the claim was in contract, the parties to the contract of employment were the applicant and the corporate employer, and his claim was against that employer only. The orders against the appellants would be set aside.

Mack v Allen; 20 November 2003; EAT/672 & 673/03
EAT: Judge Peter Clark, Mr D J Hodgkins and Mr S M Springer

RACTICE

An employment tribunal gave extended reasons, for its decision to award an applicant employee the m of £133,730 compensation for unfair dismissal and disability discrimination, which provided little or explanation of the reasoning as to why a particular conclusion had been reached under each particular ad of claim.

LORD JOHNSTON, on an appeal by the respondent employers, said that the employers argued that e employment tribunal had failed to satisfy the tests enunciated in *Meek v City of Birmingham District ouncil* [1987] IRLR 250 and *Tran v Greenwich Vietnam Community Project* [2002] ICR 1101 to the fect that in simple terms the parties had to know from the reasoning of the tribunal why they had won or st. The appeal tribunal were entirely satisfied that the way the tribunal had approached the matter was holly inadequate when it came to the issuing of reasons for the various heads of claim that it had allowed. he tribunal had more or less arrived at a conclusion and it was quite impossible to divine what particular pects of the various arguments had found favour with it. The question arose as to what should be done. he appeal tribunal could allow the appeal and remit the matter to a freshly constituted tribunal to consider the whole question of remedy, as the employers urged, or go down the line which had been ought forward by the Court of Appeal in *English v Emery Reimbold & Strick Ltd* [2003] IRLR 710, 714, ra 25: "If an application for permission to appeal on grounds of a lack of reasons is made to the appellate urt and it appears to the appellate court that the application is well founded, it should consider journing the application and remitting the case to the trial judge with an invitation to provide additional asons for his decision or, where appropriate, his reasons for a specific finding or findings. Where the pellate court is in doubt as to whether the reasons are adequate, it may be appropriate to direct that the plication be adjourned to an oral hearing on notice to the respondent." While recognising that that was personal injury case and that it was looking at the matter at the time of considering leave to appeal, the peal tribunal did not consider either distinction was relevant in the present case. The employers argued at if that line was followed their position might be prejudiced in the context of a fair hearing because of e fact that there might be opportunity for re-argument or reconsideration contrary to their interests. iat was a valid point, but, when weighed against the appalling prejudice that would be suffered by the nployee if the matter had to be started again, there was no justifiable reason at the present stage not to llow the *English v Emery Reimbold & Strick Ltd* route. If after the exercise had been completed the nployers felt that they had been prejudiced by the exercise, they would have the right reserved to them so argue at a further hearing before the appeal tribunal. Accordingly, the appeal would be adjourned for e matter to be remitted to the same tribunal so the chairman might amplify, clarify and give reasons for ch of the findings the tribunal made in respect of each head of claim.

Bax Global Ltd v French; 20 October 2003; EAT/596/03
EAT: Lord Johnston, Mrs M McArthur and Mr D Norman

RACTICE

After the conclusion of the evidence in a race discrimination case, an employment tribunal directed the rties to supply brief written submissions to the tribunal by a specified date but there was no direction for eir exchange. The parties sent their submissions to the tribunal without serving them on the other party, d the tribunal reached its decision, in favour of the employers, without the parties having had the portunity to respond to their opponents' submissions.

JUDGE BIRTLES, dismissing an appeal by the applicant employee, said that in *Barking and agenham London Borough Council v Oguoko* [see Recent Points [1999] ICR Part 9] the Employment peal Tribunal held that failure by an employment tribunal to cross-serve final written submissions was a each of the rules of natural justice and that such breach could be cured by subsequent action by the nployment tribunal. In *Oguoko* the action taken by the tribunal on a review was to write to each party king how their representations would have changed or been extended if submissions had been changed. Having received a response, the tribunal took the view that any further comments would have ade no difference to its decision. In other words the breach was cured by the action of the tribunal. In the esent case no application for a review had been made. It was not sufficient for a party to submit that ere had been a breach of the rules of natural justice by an employment tribunal, whether by a failure to fer the parties to an authority on which it intended to rely or by a failure to cross-serve parties' written bmissions and invite comments thereon. A technical breach of the rules of natural justice could not evitably result in an appeal being allowed with the remission of the case for a full fresh hearing before other tribunal. The appeal tribunal agreed with, and applied, *Stanley Cole (Wainfleet) Ltd v Sheridan* 003] ICR 1449 to the facts of the present case. In order to succeed in the appeal the appellant applicant eeded to show that she had suffered something which was "seriously irregular and unfair" (per Ward LJ, p 1458, para 28) or "substantial unfairness" (per Buxton LJ, at p 1462E, para 49). The applicant could nly point to two matters she would have wished to comment on, and the appeal tribunal could find no rious irregularity or substantial unfairness in relation to either matter.

Mayo-Deman v Lewisham College; 8 December 2003; EAT/104/02
EAT: Judge Birtles, Mr P A L Parker and Mrs M T Prosser

APPEAL JURISDICTION

An employment tribunal awarded an employee compensation of £500 under section 11 of the Employment Relations Act 1999 for a breach by the employers of her right, in section 10 of the Act, to be accompanied at a disciplinary hearing.

JUDGE RICHARDSON, dismissing an appeal by the employers, said that section 10 of the 1999 Act introduced the right for a worker to be accompanied if he was required or invited by his employer to attend a disciplinary or grievance hearing. If the employer failed to comply with his duty under section 10, the employee could make a complaint to an employment tribunal under section 11, and if the employment tribunal found the complaint well-founded it had to order the employer to pay compensation not exceeding the modest sum of two weeks' pay. The employee had taken the point that the Employment Appeal Tribunal had no jurisdiction to hear the appeal. The appeal tribunal had limited jurisdiction conferred by or under section 21 of the Employment Tribunals Act 1996. In regard to employment tribunals, its jurisdiction was conferred by section 21(1). As section 21(3) made clear, jurisdiction to hear such appeals might be conferred by other statutes; but it was plain from section 21 that the appeal tribunal did not have jurisdiction over employment tribunals unless there was a statutory provision conferring that jurisdiction. The list of proceedings in section 21(1) was defined by reference to the statute or regulation which conferred jurisdiction on employment tribunals to hear proceedings. The list was lengthy. The full range of an employment tribunal's daily work was covered; but the Employment Relations Act 1999 was not in the list. So section 21(1) did not confer jurisdiction to hear an appeal against a decision on a complaint under section 11 of the 1999 Act; nor did the 1999 Act itself; nor did any other statute. There was simply no jurisdiction to hear an appeal on a complaint under section 11. So extensive was the jurisdiction of the Employment Appeal Tribunal to hear appeals from employment tribunals that it was not surprising if practitioners overlooked that point. Moreover, there was a reported case of the Employment Appeal Tribunal under section 11: see *London Underground Ltd v Ferenc-Batchelor* [2003] ICR 656. Since the Employment Appeal Tribunal, though a superior court of record, was a court of limited statutory jurisdiction, no earlier mistake, agreement, order or failure to take the point could confer jurisdiction. It was the duty of the appeal tribunal to decline jurisdiction.

Refreshment Systems Ltd (trading as Northern Vending Services) v Wolstenholme; 27 October 2003; EAT/608/03

EAT: Judge Richardson, Mr I Ezekiel and Ms J Drake

COSTS

Following his dismissal in November 2002, an employee formally requested a written statement from his employer giving particulars of the reasons for dismissal, pursuant to section 92(1)(a) of the Employment Rights Act 1996. On 2 December 2002 the employer's solicitors refused to provide reasons, saying that the employer was not required to do so. On 15 January 2003 the employee presented an originating application, claiming a declaration based on his understanding of the real reason why he was dismissed. On 5 February 2003 the employer lodged its notice of appearance which did not set out any reason for dismissal or suggest that any was to be provided. Finally, on 26 March 2003 the employer's solicitors wrote setting out the reasons for dismissal. An employment tribunal chairman allowed an application by the employee for costs from 2 December 2002 (on the ground that the employer and its representatives had acted vexatiously and otherwise unreasonably), rejecting the employer's submission that he had no power to award costs prior to the commencement of proceedings.

JUDGE RICHARDSON, allowing an appeal by the employer, said that the employment tribunal's power to award costs, in rule 14 of the Employment Tribunals Rules of Procedure 2001, was founded on a finding as to the way a party had brought or conducted proceedings. The conduct of a party prior to proceedings or unrelated to proceedings could not found an award of costs. It was necessary for there to be a causal relationship between the conduct of a party in bringing or conducting proceedings and costs which were awarded under rule 14. It followed that the employment tribunal had no power to award costs against a party until the time the party had brought, or conducted, proceedings. The chairman had erred in law in awarding costs from 2 December 2002. An employment tribunal, having found fault in the conducting of proceedings, needed to examine carefully what loss was attributable to that conduct. It could make a broad assessment, but it could not backdate its award to include costs which were not attributable to that conduct. The employer's second line of submission was that its conduct in the course of the proceedings could not be characterised as vexatious or unreasonable. Concentrating on the period which began with the lodging of the notice of appearance, a notice of appearance was required to set out sufficient particulars to show on what grounds a party resisted the proceedings. The notice in the present case did not set out any case about the reason for the dismissal, nor say that it was intended to give a reason

or dismissal. If it had done that, subsequent costs would have been avoided. It was not reasonable to file a notice of appearance which was effectively a holding notice in the hope of deflecting the need to comply with a statutory obligation. Once proceedings had begun, the time for prevarication was over. It was plainly unreasonable to continue to prevaricate. Therefore, the chairman's error in awarding costs prior to the notice of appearance did not invalidate his conclusion relating to the proceedings thereafter. The matter would be remitted for rehearing to establish the costs attributable to the employer's unreasonable conduct from the time of the notice of appearance. In so doing the chairman should have regard to principles of the kind set out in the Civil Procedure Rules.

Health Development Agency v Parish; 24 October 2003; EAT/543/03
EAT: Judge Richardson, Dr S R Corby and Mrs M V McArthur

EMPLOYEE

An employment tribunal held, as a preliminary issue, that an applicant was not an employee for the purposes of pursuing a complaint of unfair dismissal against the respondent company under the Employment Rights Act 1996. The applicant had entered into two fixed term agreements, one with three associated companies of the respondent company ("the advisory agreement") and one with the respondent company, on the same day. Both required the applicant to provide advice, assistance and support for two particular investment opportunities. The advisory agreement provided that he was to be paid a daily retainer and expenses and the other agreement had attached to it a document entitled "Terms and Conditions of Fixed Term Employment". The employment tribunal held that there was no enforceable contract between the parties, merely "a documentary trail which did no more than reiterate the obligations which the applicant was already under and being paid for pursuant to the advisory agreement". The Employment Appeal Tribunal allowed an appeal by the applicant and remitted the issue to be reheard.

MUMMERY LJ, dismissing an appeal by the respondent company, said that the appeal tribunal had pointed out that the employment tribunal did not hold that the "employment document" was a sham and it spelt out a large number of terms and conditions which were consistent with a contract of employment, even though they did not include provisions as to remuneration. His Lordship could not be persuaded that the poorly reasoned decision of the employment tribunal could stand. The decision that there was no contract between the company and the applicant failed properly to address the obvious fact, which was central to the determination of the applicant's relationship with the company, that the two contemporaneous agreements made between the related parties needed to be read together. The combined effect of the documents had to be ascertained by construing their provisions in the context of all the surrounding circumstances. The employment tribunal had erred in law in failing to conduct that exercise.

MAY and **PILL LJJ** concurred.

Emerging Markets Partnership (Europe) Ltd v Bachnak; [2003] EWCA Civ 1876
CA: Pill, Mummery and May LJJ; 19 December 2003

PRACTICE

An employment tribunal chairman refused applications by the respondent to a complaint of unfair dismissal (1) to postpone the hearing of the complaint, and (2) to hold a preliminary hearing into a claim that matters within the originating application were privileged.

JUDGE McMULLEN QC, dismissing an appeal by the respondent against the refusal to postpone and allowing an appeal by the respondent against the refusal to hold a preliminary hearing, said that the chairman gave as the reason for refusing to postpone the hearing that "the inconvenience to the respondent is not a sufficient reason". The respondent contended that that contained an inadequate statement of reasons. An order involving a simple matter such as listing was not a decision requiring extended or summary reasons. The chairman had given a reason, aptly summarised as rejecting inconvenience to the respondent as a sufficient ground. In a case where both parties were represented and had put in written submissions on an interim application, one could infer by the rejection of one party's view that the successful party's view had been upheld. The respondent's second argument was that the chairman did not consider the overriding objective in regulation 10 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2001. It was not necessary for every order and every decision in the employment tribunal to cite regulation 10, and the balancing factors set out in the chairman's order indicated that he had the overriding objective fully in mind, for it was said: "A chairman of tribunal has considered carefully what you say and has balanced that against the desirability of bringing this case to a hearing without delay." That was a straightforward recognition of the duty of an employment tribunal to pay attention to the overriding objective. Turning to the preliminary point on privilege, *Independent Research Services Ltd v Catterall* [1993] ICR 1, 5, indicated that where an issue arose as to without prejudice material it ought to be dealt with by a body that was not going to deal with the ultimate adjudication. An issue such as privilege should properly be taken, if it could, as a preliminary point for the reasons given in that case. That would ensure that there would be no contamination of a subsequent tribunal by its having heard the material. Sometimes the issue arose in a hearing and the judge or tribunal had to deal with it, but when the

issue arose in advance it was practicable and desirable to have it considered by a chairman alone or by a tribunal who, if they ruled the material out, would not be called on to decide the substantive issue. The chairman erred in not allocating the privilege claim to a preliminary hearing. Accordingly, the order for there to be a hearing would stand but it would be concerned with whether to strike out the matters relying on what was said to be privileged. Responding to a request for some guidance to parties making interim applications to an employment tribunal, it seemed that, when both parties were anxious to have interim decisions made quickly, any application should be lodged with the tribunal and served on the other side, both as a matter of practicality and as a matter of transparent justice. That would cut down time and comply with the duty of parties to enable the tribunal to carry out the overriding objective. A simple way of achieving that, and a good practice, would be to indicate on the face of a document that it was being copied to others and for copies to be sent.

Jonathan Bailey Associates (UK) Ltd v Shapland; 10 December 2003; EAT/957 & 958/03
EAT: Judge McMullen QC

[2004] ICR Part 5

REMUNERATION

On an employee's reference, pursuant to section 11 of the Employment Rights Act 1996, for a determination of what particulars ought to have been included in his particulars of employment, following a transfer of his employment to the respondent transferee, the employment tribunal held that a share ownership scheme operated by the transferor, whereby sums were deducted from employees' salaries and paid into a trust fund to which the transferor also contributed and from which employees had an option to buy shares at a discount, was not "remuneration" for the purposes of section 1(4)(a) and did not form part of his conditions of employment on transfer.

JUDGE ANSELL, dismissing an appeal by the employee, said that in *Keiller v Lothian, Borders & Angus Co-operative Society Ltd* (unreported) 25 September 2002 the Employment Appeal Tribunal in Scotland held that the employment tribunal had been correct to dismiss an employee's claim for a declaration that benefits under an employer's "sharesave" scheme were to be regarded as remuneration within the terms of section 1 of the 1996 Act. Lord Johnston said: "It is the self-evident starting point in considering what constitutes employees' remuneration in the context of employment that the money in question must stem or flow from the employer." On the facts of that case there was no evidence that the employer made any contribution either to the discounted share price or to the bonus which was added to the moneys paid in by the employee, and the employee in the present case sought to distinguish it on the ground that in his case there was evidence that the employer did make a contribution, albeit indirectly and through the trust fund, to the operation of the scheme. The employers made the point that any payments that could be regarded as profit in the hands of the employee, i e the share discount and the bonus, were made by the trust fund to the particular employee, even though the employer might have made some contribution to the general operation of the fund. The respondent then relied on the definition of remuneration in section 1(4) of the Act, and made the points that paragraph (b) clearly contemplated it was something paid by the employer on a regular basis; that paragraph (k)(ii) also contemplated it as something that was paid by the employer; that paragraph (k)(iii) drew a distinction between remuneration and benefits; and that section 2(4), in requiring particulars falling within section 1(4)(a) to be included in a single document, clearly indicated that Parliament did not contemplate that section 1(4)(a) required an employer to declare the detailed rights and obligations under or in connection with a scheme such as the present since it would not be practicable to provide the relevant particulars in a single document. In terms of case law, the respondent argued that the scheme did not fall within the definition of remuneration in *S & U Stores Ltd v Wilkes* [1974] ICR 645, since it was not a sum which was paid by way of wages or salary, nor was it reimbursement of amounts incurred by an employee which contained a profit element and they argued the scheme was no more than a benefit in kind. The appeal tribunal could find no fault in the employment tribunal's conclusions. There were no regular or periodic sums being paid by the transferor to or for the benefit of this particular employee such as to create a profit in his hands which flowed directly from his employer. Any profit or benefit he received would come from the trust fund, the employer making no direct financial contribution to the employee's particular fund.

Jones v Liberata Life Pensions Investments Ltd; 6 February 2004; EAT/897/03
EAT: Judge Ansell, Mr P Dawson and Mr T Stanworth

REVIEW APPLICATION

An employment tribunal chairman refused to review an order, whereby an employee's originating application had been struck out because of his failure to comply with an interlocutory order to give

sclosure and serve a schedule of loss, on the ground that there had been a failure to comply with the order ithout any explanation for the failure being provided and the application, therefore, had no reasonable rospect of success.

RIMER J, allowing an appeal by the employee, said that there was no basis on which the striking out rder could be criticised. An unexplained failure to comply with orders such as those made in the present ase was on the face of it unreasonable conduct which might deserve an appropriate sanction, including riking out the application. The tribunal had gone through the procedure specified in rule 4(8) of the mployment Tribunals Rules of Procedure 2001 but had received no response to its second warning letter. n the refusal to review, the employee's submission was that his request to review the striking out order as in substance a request to be given the opportunity of arguing that he should be relieved from the nction imposed by that order; and that, in dealing with that request, the chairman should therefore have id regard to the considerations set out in paragraphs (a) to (i) of CPR, r 3.9. It was said that the chairman id focused on merely one of those factors, which she had regarded as by itself fatal to any hope of success n a review, and there was no basis for a conclusion that she also took into account, in particular, the atters referred to in paragraphs (a), (g), (h) and (i). The employee's submission depended on the roposition that the chairman ought to have had regard to the r 3.9 factors as material to the exercise she as performing. It was said that, although that rule was not expressly incorporated into the 2001 Rules, ie tribunal's duty to have regard to the overriding objective in regulation 10 necessarily required it to treat ie approach identified in r 3.9 as analogously applicable to the way an employment tribunal should pproach a like question. In principle, it was correct that, in dealing with the application before her, the hairman ought to have had regard to the r 3.9 factors. She should have asked herself whether, taking iem all into account, the employee had a reasonable prospect of persuading the tribunal on an inter partes earing that he should be relieved from the finality of the striking out order. That conclusion was not ached on the basis that r 3.9 was to be regarded as impliedly incorporated into the Rules, which it was ot, but assistance was derived from not only *Goldman Sachs Services Ltd v Montali* [2002] ICR 1251, but so *National Grid Co plc v Virdee* [1992] IRLR 555. As Judge Peter Clark said in *Goldman Sachs*, p 1256, employment tribunals had now to exercise their powers under the Rules in accordance with the me principles that applied under the CPR. Accordingly, the chairman had misdirected herself in the anner in which she disposed of the request for a review. She had regard, in effect, to just one of the r 3.9 ctors; and, though that was a very important one, it did not follow that by itself it was inevitably fatal to ie success of a review. Another important consideration was that the employee had provided both the iscovery and the loss schedule two days after the striking out order and, if relief were to have been granted romptly, the hearing date could probably still have been kept. The employee could at least be said to have reasonable, or realistic—meaning better than fanciful—chance of success on a review hearing, and herefore there would be a direction for a hearing by the employment tribunal of his application for a eview of the striking out order.

Maresca v Motor Insurance Repair Research Centre; EAT/752/03
EAT: Rimer J (sitting alone); 6 February 2004

/RONGFUL DISMISSAL

An employee, who was summarily dismissed 33 days short of completing the one-year qualifying eriod for the right to claim unfair dismissal, brought a successful complaint of wrongful dismissal in the mployment tribunal. She was awarded damages comprising the pay she would have received during her hree-month contractual notice period and, additionally, a sum representing the award she would have eceived, had she been able to bring a claim for unfair dismissal. The Employment Appeal Tribunal llowed an appeal by the employer against the latter part of the award.

BROOKE LJ, dismissing an appeal by the employee, said that Parliament had expressly legislated to the ffect that an employee dismissed without the statutory period of notice attributable to his employment as deemed to have an effective date of termination of employment at the end of the statutory notice eriod: see now section 97(2) of the Employment Rights Act 1996. The complication in the present case ay in the fact that, whereas the employee's statutory period of notice was only seven days, she had a ontractual entitlement to three months' notice. In *Johnson v Unisys Ltd* [2001] ICR 480 the House of ords held that the existence of a statutory remedy for unfair dismissal precluded the development of a ommon law obligation on an employer to exercise a power of dismissal in good faith. In the present case ie Employment Appeal Tribunal held that that decision precluded them from upholding the employment ribunal's additional award, saying: "Quite simply, the employee is seeking to circumvent the restrictions nd limits which Parliament has imposed on compensation for unfair dismissal. That is impermissible." is Lordship could not fault the reasoning of the appeal tribunal. It was not open to the courts, through ie machinery of an award of damages for wrongful dismissal, to rewrite Parliament's scheme and to place financial burden on employers which Parliament had decided not to impose on them. To take any other ourse would be to expose courts and tribunals to something akin to the chaos which Lord Millett in *ohnson v Unisys Ltd*, para 80, feared. Everyone was now familiar with the statutory scheme for claiming ompensation for unfair dismissal. The effective date of termination could generally be identified without oo much difficulty, and, provided that it fell at a time when the employee had attained the statutory right

not to be unfairly dismissed, then an application could be made to an employment tribunal, subject to the strict time limit. If the employee's submission were well-founded, a wrongfully dismissed employee whose effective date of termination pre-dated the end of their first year of employment would have the benefit of a much longer limitation period in which to make a claim that the dismissal deprived them of the chance of continuing in employment for a longer period and then making a claim for unfair dismissal. In the present case that claim could not be based on the actual facts of the employee's dismissal because by statute she had no right to claim compensation for unfair dismissal in respect of that dismissal. Instead, the court would have to speculate about the chances of her being unfairly dismissed on some hypothetical occasion after her statutory right had accrued. That would be a very unsatisfactory way of proceeding.

CHADWICK LJ delivered a concurring judgment, and SCOTT BAKER LJ agreed.

Virgin Net Ltd v Harper; 10 March 2004; [2004] EWCA Civ 271
CA: Brooke, Chadwick and Scott Baker LJJ

[2004] ICR Part 6

BREACH OF CONTRACT

An employment tribunal held that it had no jurisdiction to consider a respondent employer's counterclaim, for losses incurred as a result of the alleged breach by the applicant employee of the implied term that he would take reasonable care in the performance of his duties during his employment, on the ground that the claim was not outstanding on the termination of the employee's employment as required by article 4 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

JUDGE WILKIE QC, allowing a cross-appeal by the employer, said that the purpose of the 1994 Order was to enable an employment tribunal to deal with both a claim of unfair dismissal and a claim for damages for breach of the same contract of employment. The right for an employee to bring a claim was not subject to any special restriction. By contrast the employer's ability to bring a claim was limited to cases where the employee had already brought a contractual claim pursuant to the Order. In *Hendricks v Lewden Metal Products Ltd* (unreported) 11 March 1996 the Employment Appeal Tribunal said that the words "the claim . . . is outstanding on the termination of the employment of the employee against whom it is made" in article 4(d) of the Order limited claims to those already made but remaining unresolved at the time of the termination of the employment. Were that correct, it would seriously impact on the achievement of the purpose of the Order which was to avoid duality of proceedings. The meaning of "outstanding" could not be limited to claims which had already been made but had not yet been resolved. The normal meaning of "outstanding" was "unresolved, unsettled, unpaid, remaining owing, and/or due". None of those had as a condition that a claim had already been made. The appeal tribunal agreed with the view of the Employment Appeal Tribunal in *Mitie Lindsay Ltd v Lynch* (unreported) 6 October 2003, which endorsed the reasoning in the *IDS Handbook*, p 18: "Despite . . . *Hendricks* there is in fact nothing . . . which states that an employee has to have raised a matter with his or her employer during the currency of the employment in order for it to be classed as outstanding when the employment ends." The employment tribunal had erred in accepting submissions based on *Hendricks* that it did not have jurisdiction to consider the employer's complaints of breach of contract on the ground that no such claim had been made prior to the termination of the employment. The claims remained outstanding at the time of termination and the tribunal did have jurisdiction to entertain them.

Perrie v Mertrux Ltd; 28 January 2004; EAT/736/03
EAT: Judge Wilkie QC, Mr C Edwards and Mr S Yeboah

PRACTICE

At the end of an employee's case of unfair constructive dismissal, the tribunal chairman asked the respondent employer's solicitor whether she intended to make any submissions. She replied that she did not and presented the employer's case. At the conclusion of the hearing the tribunal reserved its decision and ordered written submissions to be exchanged. At the subsequent request of the employee, the tribunal permitted her to submit further submissions in reply to the employer's final submissions and, subsequently, extended the time for so doing. The employee also wrote to the tribunal inviting them to recuse themselves in the light of the question that had been addressed to the employer's solicitor. The tribunal chairman considered that application and refused it on the ground that in the interests of justice and in accordance with the overriding objective there should be finality in concluding the case. The tribunal dismissed the employee's claim.

BURTON J (PRESIDENT), dismissing appeals by the employee at an ex parte preliminary hearing, said that there was no appeal against the substantive decision. The first appeal related to the order for

written submissions. The employee had wanted to have the last say. The result had been that the tribunal had varied the direction and, as one would expect by way of the kind of flexibility of case management which tribunals operated, when the employee had asked for time she obtained it and suffered no prejudice. The employee argued that the order was wrong in principle because there was a fundamental right of the person carrying the onus to make their submissions last. It was the case in general terms that when oral submissions were made the person who carried the onus had the last word. But that situation had been overtaken by the more modern system of written submissions, with no stipulation as to the order in which anything was to be read. It was not unusual for there to be a mop-up exercise with final responses or corrections and it was sensible for that to be done by way of exchange. There was no point of principle involved. The second appeal related to the question put to the employer's solicitor. There was only one context for such a question: that the tribunal was of the view that the employee's case was not a strong one and the tribunal was implicitly inquiring whether a submission of no case was to be made. The employment tribunal was entitled, albeit in an exceptional case, to dismiss a case at half-time if an application to that effect was made. It had been emphasised in the Court of Appeal that that was a rare power, and certainly would not be appropriate where the onus did not lie on the party going first. In fact no such application was made in the present case, and no expression of opinion was made by the tribunal. Cases cited by the employee, which emphasised the importance of the absence of bias, were helpful in indicating a line that could be drawn. The appeal tribunal were entirely satisfied, with the benefit of that guidance, that the present was not a case in which a concluded, pre-judged view was put forward by the tribunal. There was no arguable case of apparent bias. The employee then submitted that the chairman ought not to have taken the decision not to recuse alone. The basis on which the chairman seemed to have taken the view that he could and should make that decision was one of proportionality and cost saving. The right course would have been for the chairman to have consulted the members by telephone, fax or email, so that there could have been an input from them in the making of a decision. The decision was not one the chairman had no jurisdiction to make but was one that ought to have been made by all three members. The appeal tribunal was, however, satisfied that the decision would have been the same if taken by all three together. There was no ground for the tribunal to recuse itself because there was no apparent bias.

Hudson v Testway Housing Ltd; 9 March 2004; EAT/825 & 826/03
EAT: Burton J (President), Dr S R Corby and Mr J Hougham

REPUDIATION

The defendant became the resident porter at a block of flats in 1993, appointed by the then managing agents. The claimant took an assignment of the headlease in March 2002, and, in 2003, gave the defendant a letter of dismissal with four weeks' notice, expiring on 25 March 2003, instead of his statutory entitlement to nine weeks. After 25 March the defendant continued to occupy the flat and perform porterage duties. In December 2003 the underlessees formed a management company to take over the management from 11 April 2004 and proposed to employ and accommodate the defendant. The claimant was granted a possession order in the county court.

MAURICE KAY LJ, allowing an appeal by the defendant, said that the judge held that the claimant had become the defendant's employer when it had taken an assignment of the headlease. It was a fundamental principle of the law of contract that a repudiatory breach did not of itself terminate a contract. It was the acceptance of the repudiatory breach, as such, by the innocent party which brought about termination. That doctrine applied to contracts of personal service as it applied to the generality of contracts. In the real world of employment there was usually no room for debate about whether an employer's repudiation had been accepted by the employee. In most cases it was self-evident, and often a matter about which the employee had no real choice. The defendant submitted that the present was an exceptional case because of the fact that he continued to perform the same tasks after 25 March 2003 as he had been performing before, and, of course, continued to live in the flat. It was apparent that the trial had been conducted on both sides on that assumption. At trial it was the claimant that was asserting that the contract of employment had come to an end on 25 March. Thus, it was for the claimant to prove that its repudiation had been accepted by the defendant. The judge fell into error by failing to approach the case on that basis. To the extent that there was a gap in the evidence, he allowed it to operate against the defendant. While acceptance might be easily inferred in most cases, the evidence in the present case, and the unusual factual matrix, did not support, or at the very least might not have supported, such an inference. It was not obvious that the judge had in fact drawn such an inference. What he seemed to have done, erroneously, was to have held against the defendant a failure to prove that he had not accepted the repudiation. If there was an evidential lacuna about acceptance, it ought to have benefited the defendant rather that the claimant. The order for possession could not stand. Such an order could only be founded on the termination of employment having occurred as the claimant alleged.

JONATHAN PARKER LJ agreed.

Beazer Investments Ltd v Soares; 26 March 2004; [2004] EWCA Civ 482
CA: Jonathan Parker and Maurice Kay LJJ

TRADE UNION ACTIVITIES

An employee was moved from the site where he normally worked to a less congenial site, losing his supervisor status, when the client of his employer at whose site he worked, required the employer to move him, alleging that he had attempted to recruit their staff into the union of which he was a branch secretary. On his complaint under section 146(1)(b) of the Trade Union and Labour Relations (Consolidation) Act 1992, an employment tribunal found that, although no complaint was, or could be, made of the employee's conduct, his complaint failed because his employer's purpose in moving him was to retain the contract with its client, despite the detriment to the employee, and was not to deter or prevent or penalise him on grounds related to trade union activities.

JUDGE RICHARDSON, dismissing an appeal by the employee, said that the purpose to which section 146(1) referred was the purpose of the employer, and the employment tribunal had rightly concentrated on the employer's purpose. In *Department of Transport v Gallacher* [1994] ICR 967 Neill LJ observed that the crucial issue in that case was the employer's criticism that the tribunal did not distinguish between effect and purpose and emphasised that it was important to adhere strictly to the words of the statute, saying: "in this context 'for the purpose of' connotes an object which the employer desires or seeks to achieve." In the present case the employment tribunal did not fall into error. It expressly found that it was not the employer's purpose to prevent or deter the employee from his union activities but to retain the contract with the client. It found that the employer's purpose was different from that of its client. Even if the effect or consequence of what the employer did was to prevent or deter union activities by the employee, it did not follow that that was its purpose. That conclusion was consistent with section 150, which applied only to a complaint under section 146(1)(c) and which in subsection (3) provided that a tribunal might order compensation to be paid by the person joined (pursuant to subsection (1)) instead of by the employer. The present case illustrated the limits on the protection provided by section 146. It might be thought desirable that a provision along the lines of section 150 should be available to allow the joinder of those who brought pressure on employers, whether or not the pressure related to industrial action. But it was to be observed that the Act placed the burden on the employer to prove the purpose for which he acted or omitted to act, if he had thereby subjected an employee to a detriment: section 148(1). An employer who used third party pressure as a pretext for his own purposes or who worked hand in glove with a third party in order to prevent or deter union membership or activities would find section 148(1) to be an obstacle. An employment tribunal was entitled to scrutinise the true purpose of acts or deliberate omissions which had the effect of preventing or deterring union membership or activities.

Smyth-Britt v Chubb Security Personnel; 21 November 2003; EAT/620/03
EAT: Judge Richardson, Mr P Gammon and Ms P Tatlow

ONSTRUCTIVE DISMISSAL

An employment tribunal dismissed an applicant employee's complaint of unfair constructive dismissal the ground that, even if there were sufficient breaches of the implied term of trust and confidence for the plicant to be entitled to resign, the act relied on as the "last straw" and which led him to resign was asonable conduct by the employers.

JUDGE PROPHET, allowing an appeal by the applicant, said that, in situations which involved a series actions by the employer, it was necessary for the employment tribunal to look at the earlier matters, plus e final act, in order to decide whether cumulatively they constituted a fundamental breach of contract titling the employee to resign and claim a constructive dismissal. Where the employee was claiming a ries of acts culminating in an act alleged to be a final straw, the important case was *Lewis v Motorworld arages Ltd* [1986] ICR 157. There it was emphasised by the Court of Appeal that, if there was a final act the employer which caused the employee to resign, it was not essential for that final act itself to nstitute a breach of contract. The employment tribunal indicated in their reasons that, because the final t, which caused the applicant to resign, was not a breach of contract, but fully in accordance with the rms of his contract, there could be no constructive dismissal. They also added that the action of the nployers was a reasonable one. The employers submitted that, in order to constitute a "last straw", the nduct of the employer had to be unreasonable in some way, and that the tribunal had expressly found at the employers' actions in respect of non payment of wages had been reasonable. The difficulty about at argument was that in all "last straw" situations matters turned to some extent on the perception of the nployee at the time he felt that he had been treated unreasonably or unfairly by his employer. It was that at caused him to decide to resign, bringing into the picture previous actions by the employer about which had complained. It would be wrong to say that any possibility of a finding of constructive dismissal in ch a situation was negatived if the final action of the employer was subsequently found by the nployment tribunal to have been reasonable. The case law indicated that the function of the employment bunal when faced with a series of actions by the employer was to look at *all* the matters and assess nether cumulatively there had been a fundamental breach of contract by the employer. The appeal bunal was unable to find the answer to that question in the reasons of the employment tribunal in the esent case. It would not be appropriate for the appeal tribunal to substitute a decision on the matter of nether the applicant was or was not constructively dismissed, nor would it be proportionate for the tter to be remitted to a different tribunal. The case would, therefore, be remitted to the same nployment tribunal for it to answer the question whether the previous acts of the employers, together th the final act, *cumulatively* constituted a fundamental breach of the applicant's contract of nployment. Permission to appeal granted.

Omilaju v Waltham Forest London Borough Council; 31 March 2004; EAT/941/03
EAT: Judge Prophet, Mr J C Shrigley and Mr D Welch

RACTICE

A doctor brought complaints of direct and indirect race discrimination against, inter alia, three co-eratives, formed to enable doctors to deal with the out of hours requirements of patients, on the ground at the policy adopted by the co-operatives, the membership qualification for which was limited in such a y geographically that it excluded the applicant's practice from membership, had a racially criminatory effect. The employment tribunal rejected the claims of indirect discrimination and rejected claim of direct discrimination against two co-operatives but upheld it against a third.

BURTON J (PRESIDENT), allowing an appeal by the co-operative, said that the decision of the ployment tribunal was 54 pages long and there were no paragraph numbers. That was the practice of ost employment chairmen in Scotland, but not in England. Its significance in relation to a lengthy cision, such as the present, was that, without paragraph numbers, the parties found it far more difficult identify those parts of the decision in their notice of appeal or skeleton argument to which particular ention was drawn. The appeal tribunal, therefore, asked that in future chairmen enabled the clear ception of their decisions to be carried out by reference to paragraph numbers. The appeal tribunal also ged that there be not the practice, quite frequent in England when using paragraph numbers, of running o massive numbers of sub-paragraphs and sub-sub-paragraphs. That not only led to a lack of derstanding of where one had reached in a decision, but also very often to some scrabbling around in gthy decisions to discover of what paragraph some sub-sub-paragraph formed part. Chairmen were, refore, urged to adopt consecutive paragraph numbering; and where it was helpful if particular ragraphs were broken up into sub-paragraphs, which should not happen on any kind of protracted basis, y should be enumerated by using the numbering 12.1, 12.2, etc for the duration of the relevant ragraph. The nub of the case itself was that in relation to the policy of the appellant co-operative of iting the geographical ambit of the co-operative and excluding the applicant's practice there was direct

discrimination, because the explanations given by the co-operative for that basis of exclusion was unjustifiable: not because it was indirectly discriminatory but because it was directly discriminatory. The tribunal did not recite the explanations which were in fact given in some detail by the co-operative. Whether or not they were good, if they were to be rejected by the tribunal because they were not a sufficient explanation for the exclusion of the applicant's practice, there was required to be such a finding by the tribunal. But the tribunal did not explain why it rejected the reasoning of the co-operative; and, even apart from the inadequacy of its dealing with that issue, the tribunal certainly did not deal with the consequence of that conclusion and why it came to the view that the only available inference was that the reason why the co-operative rejected the approaches of the particular practice was on racial grounds. The tribunal erred in law in its approach and the decision could not stand. The matter would be remitted to a different employment tribunal for the issue of race discrimination to be reheard.

Kirkcaldy Out of Hours GP Co-operative v Goyal; 27 April 2004; EATS/83/03
EAT(Sc): Burton J (President), Miss S B Ayre and Miss A Martin

REDUNDANCY

On 29 July 2002 an employee entered into a four-week trial period in another job when his existing position became redundant. Before the expiry of the trial period he wrote a letter to the employers saying that the new position did not suit him and that he wished to apply for redundancy, as a result of which the employers met with the employee and there was an agreement to extend the trial period. Within the extended trial period, but outside the original four-week period, the employee wrote a further letter saying that he would be leaving on 31 October 2002. An employment tribunal found that the employee's first letter was intended to terminate his new employment and that he was entitled to a redundancy payment.

BURTON J (PRESIDENT), allowing an appeal by the employers, said that it was clear from section 138 of the Employment Rights Act 1996 that an employee who did not in fact leave on becoming redundant was only entitled to qualify for a redundancy payment by way of a statutory extension to his entitlement if he either terminated the contract during the trial period or gave notice to terminate during that period and the contract terminated as a consequence of that notice. The only circumstance in which the trial period of four weeks could be extended was where an extension was agreed for the purpose of retraining the employee in accordance with section 138(6), and in the present case there had been no extension of the trial period by virtue of that subsection. The issue on the appeal was whether as a matter of law the employment tribunal had been entitled to construe the employee's first letter as bringing him within the provisions of section 138(2)(b)(i). The tribunal did not refer to either *Morton Sundour Fabrics Ltd v Shaw* (1966) 2 ITR 84 (in the Divisional Court) or *Burton Group Ltd v Smith* [1977] IRLR 351 (in the Employment Appeal Tribunal), both of which were binding on them. *Morton Sundour* was authority for the proposition that in order to determine a contract of employment an employer had to specify when the termination was to occur, or at least to make it possible for that to be ascertained; and that was followed and adopted in the *Burton Group* case. Both cases concentrated on dicta emphasising that a notice by an employer could not be effective without a termination date. The same clearly applied to a notice to terminate given by an employee. If it were the case that a letter such as the present employee's first letter, which clearly expressed a wish to apply for redundancy, was a notice to terminate, the consequence would be extremely detrimental to the interests of many employees who might send such letters, expressing an interest in a redundancy scheme but not intending in any way to resign, since it would give the employer the opportunity to accept as a resignation letter something that was nothing of the kind. It was quire plain that, absent some special argument, the employee's letter was not a notice to terminate and should not have been so construed. It was argued for the employee that section 138(2)(b)(i) should be construed in a way different from the law of ordinary contract, and that the words "gives notice to terminate" should be read more broadly so as to include "gives notice of an intention to terminate at some stage in the future". The appeal tribunal were wholly unpersuaded that section 138(2)(b)(i) should be construed in that way. Section 138 allowed for a very limited extension of the right to a redundancy payment which otherwise accrued on termination of the original employment. The applicant was not entitled to a statutory redundancy payment.

Reality (White Arrow Express) Ltd v O'Hara; 18 November 2003; EAT/447/03
EAT: Burton J (President), Ms B Switzer and Mr B M Warman

TIME LIMIT

Claims by a trainee solicitor against her employers of sex discrimination and unfair dismissal were settled by a COT3 form signed on 18 April 2002. On 2 May 2002 the employee received from the Law Society a copy of a letter dated 22 March 2002 from the employers to the Law Society informing them that the employee's training contract had been terminated. On 9 July 2002, relying on her solicitor's advice that the three-month period for presenting a complaint ran from 2 May, the employee made a complaint that the writing of the letter of 22 March to the Law Society was an act of victimisation, contrary to the Sex

Discrimination Act 1975, by the employers. An employment tribunal held that the complaint was out of time and refused to extend time under section 76(5) of the Act.

JUDGE McMULLEN QC, allowing an appeal by the employee, said that, in exercising its discretion whether or not to extend time, the employment tribunal had erred in leaving out of account the employee's contention that she had been awaiting notification from the Office for the Supervision of Solicitors as to the outcome of a complaint relating to the termination of her training contract. Generally speaking, waiting for an internal procedure to be exhausted was not sufficient grounds for postponing the filing of a claim; however, in the regulated regime of solicitors' contracts the situation might well be different. Secondly, the tribunal had plainly visited the fault of the employee's solicitor upon her. Although in the Employment Appeal Tribunal a fault by a legal adviser in failing to lodge an appeal in time was not generally grounds for the exercise of discretion to extend time, the position seemed to be different at first instance where different considerations applied. In *Hawkins v Ball* [1996] IRLR 258 Keene J held that a tribunal did not err in paying attention to that factor. A tribunal ought to consider the check list under the Limitation Act, suitably modified for the purposes of an employment tribunal claim, as Smith J did in *British Coal Corpn v Keeble* [1997] IRLR 336, but would not fall into error unless it omitted a significant factor. Where the issue turned on the steps taken by an applicant to obtain and act on legal advice, *Steeds v Peverel Management Services Ltd* [2001] EWCA Civ 419 indicated that wrong advice, or the existence of an implied case against negligent solicitors, ought not defeat an applicant's contention that the claim ought to be heard. Inextricably linked to the taking of advice was the concept that the party was not relying on his or her own or actual or imputed knowledge. A trainee solicitor experienced in employment matters was entitled to entrust litigation to another experienced solicitor and to rely on her advice. The concession that the cause of action arose on 22 March 2002 was not easy to make. The concept of a crystallised right, as understood in *Clarke v Hampshire Electro-Plating Co Ltd* [1992] ICR 312, was not always easy to pin down and a trainee solicitor should not be condemned in an exercise of discretion for getting it wrong (with her solicitor). For those reasons, the employment tribunal erred in its application of the law to the exercise of its discretion when it refused to hear the employee's complaint. The case would be remitted for a hearing on the merits of the employee's victimisation claim.

Chohan v Derby Law Centre; 7 April 2004; EAT/851/03
EAT: Judge McMullen QC, Mrs L Tinsley and Mrs R A Vickers

AMENDMENT

An employee's originating application gave "the type of complaint" as "constructive dismissal" and stated in box 11 that the manager at the care home where he worked had waged a vendetta against him which "included bullying, harassment, two physical assaults, one sexual assault". At the start of the hearing the chairman considered that "the grounds of complaint in box 11 raised a clear claim of sex discrimination" and tried to explain that to the employee, who was appearing in person. The employers' counsel objected to the course of the proceedings and the chairman indicated that the tribunal would hear all the evidence and then decide whether the claim included a claim for sex discrimination. The decision of the employment tribunal was that the employee had been unfairly dismissed, that it was "just and equitable to grant leave to amend the originating application to include a claim of sex discrimination" and that the employers had discriminated against the employee on the ground of his sex.

SILBER J, allowing an appeal by the employers, said that there had clearly been a very serious misunderstanding between the tribunal and those acting for the employers on the crucial issues of whether a claim for discrimination on grounds of sex was being pursued and, if so, its ambit. The chairman was the person responsible for suggesting the amendment and thus it was clearly her duty to ensure that the parties knew both that the suggested claim for sex discrimination was proceeding and the extent and nature of the claim. In consequence, the employers were prejudiced in a number of significant ways because they would have conducted the proceedings very differently if they had understood the case on sex discrimination in the way in which it appeared that the chairman did. It was settled law that a party to any action had not had a fair hearing where he did not understand or could not reasonably be expected to have understood allegations made against him, which was the position in which the employers were placed. The tribunal failed to comply with that obligation and thus failed to give the employers a fair hearing. It followed that the finding of sex discrimination had to be quashed. The appeal tribunal could not over-emphasise the need for any proposed amendment to the IT1 of major importance to be formulated in *writing* so that everybody involved in the case knew and understood the precise ambit of the proposed amendment. Natural justice then required that if the application for the amendment was not then summarily rejected by the tribunal, the opposing parties should be given an opportunity to consider the proposed amendment and to make submissions on it before the tribunal gave its decision. In that decision the tribunal must explain its thought process in reaching its decision, and, although that could be done briefly, as the discretion to grant leave was a judicial discretion, it had to be exercised fairly and justly. The employers contended that, if the finding of sex discrimination had to be quashed, the finding of unfair dismissal had also to be quashed on the basis of the apparent bias of the tribunal. There were, however, a number of reasons which individually or cumulatively led to the conclusion that the "fair-minded observer" would conclude that it was not a case of apparent bias, but a case in which, though the employment tribunal made a number of serious mistakes, it did not do so deliberately or as a result of any form of bias. Thus, the claim for apparent bias failed and the finding of unfair dismissal was upheld. The next question was whether the claim for sex discrimination should be remitted. Significantly, the actual decision to give leave to amend was apparently only given in the tribunal's extended reasons, which explained that the employers were "not prejudiced by the amendment". The appeal tribunal were unable to agree with the employment tribunal's reasoning, which failed to take account of the fact that the employers had reasonable grounds for not appreciating even the broadest outline of the case being brought against them. They were seriously prejudiced in several ways by the retrospective amendment. Because of that unfairness the appeal tribunal would set aside the employment tribunal's decision giving the employee leave to amend to add his claim for sex discrimination. The appeal tribunal while not accepting the employers' submission that the sex discrimination claim was doomed to failure, could not itself give leave to amend for two reasons. First, the employers might not have had a full opportunity to explain the prejudice that they might suffer by having another hearing; that matter could be considered by the employment tribunal. Second, the employee had to formulate his claim for discrimination on grounds of sex in writing so that it could be considered. Accordingly, the employee's application to amend would be remitted for consideration by a different employment tribunal, and that tribunal would have to consider if leave could be granted to pursue a claim for discrimination on grounds of sex when and if such a claim was properly formulated.

Care First Health Care Ltd v McLaren; 21 June 2004; EAT/982/03
EAT: Silber J, Ms V Branney and Mr D Smith

DISCIPLINARY PROCEEDINGS

An employment tribunal upheld a complaint of unfair dismissal by a school bursar on the ground that flaws in the disciplinary proceedings leading to her dismissal were not minor and could not be overlooked, having found that the staff dismissal committee which determined that the bursar should be dismissed had consisted of only two governors when three were required and that, in express contravention of

gulation 47(3) of the Education (School Government) (England) Regulations 1999, a member of that ommittee had presented the committee's case to the dismissal appeal committee to which the bursar ppealed and which confirmed her dismissal.

JUDGE WAKEFIELD, dismissing an appeal by the governing body, said that it was argued that the ibunal were wrong in law to conclude that, in presenting the school's case at the hearing of the applicant's ternal appeal against the decision to dismiss her, the person who had chaired the staff dismissal ommittee that had originally dismissed her was acting in contravention of regulation 47(3) of the 1999 egulations, by reason (inter alia) that Part IV of the Regulations, which contained regulation 47, was esigned to regulate only membership and function of the appeal committee, that if the regulations were esigned to regulate the conduct of the hearing they would make reference to the hearing not to the ommittee, and that Part IV of the Regulations was not designed to regulate who appeared before the ppeal committee or who should act for any party before that committee. The appeal tribunal did not cept that the employment tribunal had been wrong in interpreting regulation 47(3) as they did. The ords "no member of the staff dismissal committee whose decision is subject to appeal shall take part in e proceedings of the dismissal appeal committee" appeared clearly to be much wider than any words ppropriate to a prohibition on such a person being a member of the appeal panel itself.

Governing Body of Cardinal Newman Roman Catholic School v Reid; 18 March 2004; EAT/13/04
EAT: Judge Wakefield, Ms K Bilgan and Mr A E R Manners

RACTICE

An employment tribunal heard evidence in complaints of sex discrimination over a 12-day period, the st day of evidence being the day before Good Friday. At the chairman's request written closing bmissions were delivered the day after Easter Monday and oral submissions were made that afternoon, that pre-arranged days for chambers discussion did not have to be vacated. The tribunal upheld the pplicants' complaints.

BURTON J (PRESIDENT), when allowing an appeal by the respondents on the ground that nclusions of the tribunal as to both direct and indirect discrimination could not stand, said that, after a ngthy hearing, where written submissions were then sensibly ordered by the tribunal, the timescale for eparation of the submissions had to be a sensible one. The pressure imposed on counsel in the present se was quite unfair. It was essential that the timescale should provide for the submissions to be provided the other party in sufficient time *before* the oral submissions for the other party to be able to assimilate em, and thus comment on them. It was equally, if not more, essential that the tribunal had the pportunity to read the submissions, which it had not in the present case. It was understandable that there ust have been concern at the possible waste of time in respect of the days set aside for discussion if a nger period had been given for the written submissions. But it would have been apparent for some time ior to the close of the hearing that it would be completed on the twelfth day; and it would therefore at a latively early stage have been seen that it was inevitable that there would have to be time for written bmissions to be delivered and assimilated, and that the aspiration of using the three days for chambers scussion would have to be shelved. If such decision had been taken at a relatively early stage in the idence it might still have been possible to have found other business for the tribunal. Turning to the issue whether the present case should be remitted back to the same tribunal, which would be able to make use its existing knowledge of the case and notes of evidence, the following were relevant factors.) Proportionality was always a relevant consideration. The award was for £900,000, and, although a esh hearing in front of a different tribunal would add considerably to the cost on both sides, sufficient oney was at stake for the question of costs not to offend on the ground of proportionality or even be an portant factor. The distress and inconvenience of the parties in re-living a hearing had to be weighed up, t were rendered necessary in any event by the decision to set aside the original decision and would not be eatly less by virtue of the extra time taken by a fully, rather than partially, remitted hearing. (2) Passage time: an appellate tribunal had to be careful not to send a matter back to the same tribunal if there was a al risk that they would have forgotten about the case. In the present case, however, the question of delay d loss of recollection was not a material factor one way or the other. (3) Bias or partiality: it would not appropriate to send a matter back to the same tribunal where there was a question of bias or the risk of e-judgment or partiality. (4) Totally flawed decision: it would not ordinarily be appropriate to send the tter back to a tribunal where the first hearing was wholly flawed or had been completely mishandled.) Second bite: there had to be a very careful consideration of what Lord Phillips of Worth atravers MR in *English v Emery Reimbold & Strick Ltd* [2002] 1 WLR 2409, at para 24, called "a cond bite at the cherry". The appellate tribunal would only send the matter back to the same tribunal if it d confidence that, with guidance, the tribunal, because there were matters which it had not, or had not t, considered at the time it apparently reached a conclusion, would be prepared to look fully at such rther matters, and thus be willing or enabled to come to a different conclusion, if so advised. (6) Tribunal ofessionalism: where a tribunal was corrected on an honest misunderstanding or misapplication of the gally required approach (not amounting to a "totally flawed" decision), then, unless it appeared that the bunal had so thoroughly committed itself that a rethink appeared impracticable, there could be the esumption that it would go about the tasks set on remission in a professional way, paying careful

attention to the guidance given by the appellate tribunal. The appeal tribunal were satisfied that the present was a case that could and should be remitted to the same tribunal. The reality was that there was unfinished business to be done. The tribunal would need to resolve a number of issues in accordance with the present judgment, by reference to evidence previously given and any further evidence to be adduced.

Sinclair Roche & Temperley v Heard; 22 July 2004; EAT/738/03
EAT: Burton J (President), Mr D Bleiman and Mr B M Warman

TIME LIMIT

On a preliminary issue to determine whether an employee, whose employment had commenced on 8 April 2002 and was terminated by a letter posted on 27 March 2003 but not read by the employee until 31 March 2003, had the necessary one-year qualifying period of employment to bring a complaint of unfair dismissal, an employment tribunal held that the employee had been entitled to one week's notice under section 86 of the Employment Rights Act 1996, that the starting point for the computation of that notice was the day after the letter was posted, and that, accordingly, she had not completed one year's employment.

LORD JOHNSTON, allowing an appeal by the employee, said that it was argued by the employee that the period of statutory notice could not run until she was aware that she was being dismissed, which was on 31 March 2003, that she was entitled to seven clear days from that date, taking the position to 7 April 2003, and the one-year qualifying period was established. The appeal tribunal recognised that to peril the effective date of termination on knowledge of the employee being aware of the fact that the employer was terminating their contract might introduce an element of instability, since it put it in the hands of an unscrupulous employee to delay matters by simply not reading or ignoring the letter. Nevertheless there was stability if the matter was periled on the issue of knowledge inasmuch that it was in the hands of the employer to determine how he communicated to his employee his intention to terminate employment. As was pointed out in *McMaster v Manchester Airport plc* [1998] IRLR 112, the safest course was communication verbally even if followed up by a letter. Also, it had to be open generally to argue that if an employee exploited the system, acting in bad faith, he or she could not expect to rely on it. There was no issue of bad faith in the present case. The employment tribunal accepted that the employee read the letter as soon as she received it on returning home. Therefore, the period of seven days' notice did not start to run until 1 April 2003 and the qualifying period was established. With regard to a cross-appeal, 31 March 2003 could not be counted: the statutory entitlement was clearly intended to be seven clear days. The effect of sections 86 and 97 of the Employment Rights Act 1996 was to allow the employee the further four days for which she contended, bringing the qualifying period up to 7 April, which admitted the claim.

O'Brien v Pacitti Jones; 30 June 2004; EATS/25/04
EAT: Lord Johnston, Mr P Pagliari and Mr M G Smith

DEDUCTION FROM WAGES

In two unrelated cases, employment tribunals held that, by virtue of section 14(1)(a) and (5) of the Employment Rights Act 1996, they had no jurisdiction to consider claims by employees, under section 13, that their employers had made unauthorised deductions from their wages. In the first case the tribunal considered that it was not possible to conduct an investigation into whether or not the workers had taken part in industrial action, and in the second case the tribunal concluded that section 14 was concerned with the cause of the deduction not its validity.

BEATSON J, allowing appeals by the employees, said that the proposition that a tribunal was not entitled to refuse to make findings to determine whether it had jurisdiction was well established, and it was common ground that the question whether section 14 of the 1996 Act was engaged went to the jurisdiction of an employment tribunal. It remained to consider which the jurisdictional facts were in section 14(1)(a) and (5). In section 14(1)(a) the jurisdictional fact was that there had been "an overpayment of wages" and in section 14(5) it was that "the worker has taken part in a strike or other industrial action". Only when those facts were established could a tribunal look at the employer's motivation for the deduction, under section 14(1)(a) "the purpose of the deduction" as reimbursement of an overpayment of wages, and under section 14(5) that the deduction was made "on account of the worker's having taken part in that strike or other action". In the case of section 14(5) it did not suffice that a strike or other industrial action had taken place or that the employer considered that the worker who had suffered a deduction from his wages had taken part in the strike or other industrial action. What was crucial to the determination that the tribunal had no jurisdiction was that the worker who had suffered a deduction had taken part in the strike or other industrial action. The statutory purpose behind the provisions now consolidated in the Employment Rights Act 1996 was to see that workers received their wages in full at the time they were due and that employers might not make deductions save in specified circumstances. The carefully circumscribed limits to the jurisdiction of the tribunal in section 14 would be avoided if a tribunal was entitled to determine that it had no jurisdiction without making findings as to the existence of the jurisdictional questions. Where the facts were disputed, to decline jurisdiction without making findings of fact would, in effect, allow a respondent to choose whether the employment tribunal or the county court had jurisdiction by the form of its response to a claim. Where the jurisdictional question was a pure question of law, the tribunal would almost invariably be able to reach a decision on the basis of submissions. Where, however, the jurisdictional question at issue was factual and contested, the tribunal would generally have to have evidence before it on which it could make the necessary finding of fact, and to make that finding. Investigating the jurisdictional facts did not necessarily involve investigating the lawfulness of a deduction and could be considered as a separate question. Section 14(5) could not properly be read as stating that section 13 did not apply "where an employer states that the worker has taken part in a strike or other industrial action". Accordingly, the tribunals fell into error in considering that the determination of the facts which by virtue of section 14(1)(a) and (5) removed the jurisdiction of the employment tribunal would involve them having to consider whether the deductions were lawful in the sense of authorised by the employees' contracts. It followed that they should have found the facts before concluding that they had no jurisdiction: *New Centurian Trust Ltd v Welch* [1990] ICR 383.

Gill v Ford Motor Co Ltd; Wong v BAE Systems Operations Ltd; 16 July 2004; EAT/5/04, EAT/1006/03

EAT: Beatson J, Mr M Clancy and Mr J C Shrigley

TRANSFER OF UNDERTAKING

An employment tribunal held that an applicant had sufficient continuity of employment to bring a complaint of unfair dismissal when his period of service with his previous employer was aggregated with that with the respondent employer, pursuant to section 218 of the Employment Rights Act 1996. The tribunal found that the part of the previous employer's business in which the applicant worked amounted to an undertaking in its own right which was transferred to the respondent.

JUDGE BIRTLES, dismissing the employer's appeal, said that the employer submitted that, in deciding whether there had been a "transfer" within the meaning of section 218(2) of the 1996 Act, the tribunal erred in directing itself as to whether there had been a "transfer of an undertaking" for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 1981, as they were separate and distinct concepts. But the cases relied on did not support that submission, and the employment tribunal had been right in seeking to avoid a conflict between section 218(2) and the 1981 Regulations and in trying to give the same meaning of "transfer" to both. The employer also submitted that the tribunal erred in holding that the 1981 Regulations themselves preserved statutory jurisdictional continuity for the purposes of an unfair dismissal claim. The question to be asked was whether there was anything in English case law relating to the proper interpretation of section 218(2) which militated against using the definition of "transfer" in the

Regulations. In *Celtec Ltd v Astley* [2002] ICR 1289, the Court of Appeal had recently held that, where it had direct effect, the Acquired Rights Directive preserved continuity of employment on a relevant transfer. Though it appeared that that conclusion was reached with the agreement of the parties, rather than after hearing argument, it was consistent with the decisions of the Court of Justice in *Sanchez Hidalgo v Asociacion de Servicios Aser* (Case C-173/96) [2002] ICR 73 and *Collino v Telecom Italia SpA* (Case C-343/98) [2002] ICR 38. Those cases all concerned the preservation of continuity of employment in cases where the transfer was from one state authority to another provided that the transfer was the transfer of an undertaking or part of an undertaking for the purposes of the Directive. The appeal tribunal could see no difference in the case of a TUPE transfer. Those Regulations had to be interpreted consistently with the Directive and the decisions of the Court of Justice on the equivalent provisions of the Directive. There could be no logical difference between the preservation of continuity between state authorities under the Directive and the transfer of private undertakings covered by the Regulations. There was no error of law in the conclusion reached by the employment tribunal.

D36 Ltd v Castro; 16 July 2004; EAT/853/03
EAT: Judge Birtles, Mr D Smith and Ms P Tatlow

VOLUNTARY WORKER

An employment tribunal upheld a complaint by an applicant that he had been unfairly dismissed by the respondent charity; but it dismissed his complaint that the charity had failed to comply with the National Minimum Wage Act 1998 on the ground that his claim for the national minium wage was excluded by section 44(1) because he was a voluntary worker. The applicant, who had been engaged by the charity as a caretaker for its museum, received free accommodation in return for 17 hours' work per week but no wages. In calculating the basic award for unfair dismissal the tribunal found his entitlement to be nine weeks' wages but made no monetary award since he had been permitted to live in his rent-free accommodation for 13 weeks following his dismissal.

JUDGE PETER CLARK, dismissing an appeal by the applicant, said that it was submitted on behalf of the applicant that section 44 of the 1998 Act was headed "Voluntary workers" and was intended to apply to such workers only; that the expression was not defined in the Act; and that it was clear that the applicant was a "worker" but that his employment was not voluntary: therefore, he was not a voluntary worker caught by the section. That submission suffered from an internal inconsistency. Counsel seized on the words "voluntary worker" as meaning a worker who was a volunteer, and then defined a volunteer as a person who assisted a charitable organisation without obligation to do so. However, such a person was not employed under a contract of service, nor engaged under a contract for services because the necessary mutuality of obligation was absent. He was therefore not a worker. On that ground he was excluded from the protection of the Act. The meaning and purpose of section 44 and its heading was pellucidly clear. It concerned workers, as defined in section 53, employed in the voluntary sector, as defined in section 44(1), who did not receive pay but did receive subsistence, expenses or free accommodation in circumstances relevant to the employment. That fitted the applicant's case neatly, as the tribunal found. He was excluded from the Act by virtue of section 44. Turning to the compensation for the applicant's unfair dismissal, it was accepted that in so far as the tribunal purported to set off the 13 weeks' additional free accommodation against his basic award entitlement, they were wrong in law. The real issue, however, given that nil compensation was ordered, was what nine weeks' pay was in the circumstances of the case. The definition of a week's pay was to be found in section 221(2) of the Employment Rights Act 1996 and was the amount which was payable by the employer under the contract. Old cases under the Redundancy Payments Act 1965 indicated that free accommodation was not pay. Further, it was to be noted that benefit in kind was expressly excluded from the definition of "wages" in section 27 of the 1996 Act; and that exclusion was consistent with the appeal tribunal's interpretation of "pay" in section 221(2). The point was made on behalf of the applicant that he had received nothing for the loss of his statutory rights. The obligation on the employment tribunal, under section 123(1), was to make a compensatory award which was just and equitable in all the circumstances. It was clear that the tribunal found that the provision of free accommodation for 13 weeks post dismissal extinguished any loss of employment rights or notional consultation period. That was a permissible finding.

Best v St Austell China Clay Museum Ltd; 11 June 2004; EAT/924/03
EAT: Judge Peter Clark, Ms K Bilgan and Mr S Yeboah

COSTS

On claims by an applicant employee of wrongful dismissal, breach of contract and unauthorised deduction from wages, the only sums recovered by the applicant were those based on the respondent employers' construction of the contract and on their calculations. The employers applied for an order for costs of £28,000, pursuant to rule 14(1) of the Employment Tribunals Rules of Procedure 2001 on the ground that the applicant had acted unreasonably in bringing or conducting the proceedings or that the bringing or conducting of the proceedings was misconceived. The tribunal, while upholding the application on the grounds that the claims of unfair dismissal and breach of contract had had no reasonable prospect of success and were misconceived, that there had been some unreasonable conduct and that it would be just to make an order for costs, made an award of £750, stating: "The tribunal has looked at the quantum in the round, and in this case the appropriate sum is £750."

BURTON J (PRESIDENT), adjourning an appeal by the employers and remitting the matter to the tribunal for further reasons, said that the words of Lord Phillips MR in *English v Emery Reimbold & Strick Ltd (Practice Note)* [2002] 1 WLR 2409, 2417, reflected the position where, if a costs order was to be made, the respect in which there had been unreasonableness, or one of the other categories of conduct which could lead to a costs order, had first to be identified: "Where the reason for an order as to costs is not obvious, the judge should explain why he or she has made the order. The explanation can usually be brief." Brief was one thing, but the one sentence alone in the entire decision of the tribunal was not even brief, and it formed the fundamental basis of the employers' appeal. It was unfortunate that when the matter came to be sifted at the Employment Appeal Tribunal it was sifted straight through to a full hearing, rather than taking the course explained in *Burns v Royal Mail Group plc* [2004] ICR 1103. It was very often useful where an appeal was based on inadequacy of reasons, or absence of one or more findings, for the matter to be sent back at the earliest stage for such reasons to be given, or such findings to be made, if they could, on the basis of the existing notes of evidence by the tribunal below. The importance of considering the operation of the *Burns* procedure at the sift stage in such a case, rather than waiting for the full hearing, was emphasised. Despite problems of the cost and the fact that the chairman of the employment tribunal was no longer available to sit, the right course was a remission to the same tribunal. The great advantage of the *Burns* route was that, unlike the Court of Appeal and the High Court, the employment tribunal had the power of its own motion to review its decision. Consequently, when the case returned to the tribunal for it to consider what its reasons were for arriving at the sum of £750, so that it could be seen whether its reasons were valid in law, or whether it had any reasons at all, the tribunal would also have the opportunity, if it could not think of any reasons to justify its order, or could not remember its reasons, to review its own order. When the tribunal considered the order for £750, it might do so along the following lines. Was the order a contribution towards the costs? Did it balance the fact that the two claims found to be misconceived fell to be offset to some extent? Was the £750 an assessment of some part of the costs of the hearing and, if so, on what basis? Was there some doubt as to the total recoverability of the £28,000? In which case, what sum, if any, fell to be deducted? Was there some consideration of the fact that the maximum that could be summarily assessed was £10,000? Was some sum notionally deducted from the costs which otherwise have been awarded, either on the basis of consideration of the means of the applicant (which would be unlawful) or of some other consideration?

Bryant (t/a Bryant Hamilton & Co) v Weir; 21 July 2004; EAT/253/04
EAT: Burton J (President), Mrs C Baelz and Mr D Welch

COSTS

The Employment Appeal Tribunal dismissed an appeal by an applicant trade union, from the refusal by an employment tribunal to make a protective award against the respondent company, on the ground that it was out of time.

BURTON J (PRESIDENT), dismissing an application for costs by the respondent company, said that, though, in the event, the appeal was unarguable, in the circumstances, the appellant had not been acting unreasonably in pursuing the appeal, within the confines of what was an exceptional jurisdiction so far as the award of costs was concerned. In *Coots v John Lewis plc* (unreported) 27 February 2001 it was said that it was not generally the practice of the Employment Appeal Tribunal to award costs in circumstances where the appeal had survived effectively a preliminary stage. If that was then the practice, it was no longer so, and it might well be an impermissible trammel of the power of the appeal tribunal to award costs under rule 34 of the Employment Appeal Tribunal Rules 1993. Inevitably, there was some kind of preliminary process at the appeal tribunal. Every appeal was now sifted by a judge in accordance with the *Practice Direction (Employment Appeal Tribunal: Procedure) 2002* [2003] ICR 122, para 9: some went straight through and some were the subject matter of a preliminary hearing. When there was a preliminary hearing, there was, depending on the precise order made, an obligation on, or an opportunity for, the

respondent to submit why the appeal should not go forward. Where, however, as in a very substantial number of cases, the appeal went straight through to a full hearing, there would have been no opportunity for any such input from the respondent, and there ought not to be any practice that, where a case had gone through the sift, or for that matter an ex parte hearing, costs would only be awarded in exceptional circumstances. It would, however, always be a factor that the case had been sifted, when considering whether an appeal had been unreasonably brought, not least because the Registrar had the power effectively to strike out an appeal under rule 3 of the 1993 Rules, if it appeared that there was no jurisdiction to hear it—and, under proposed new rules, if the appeal had no reasonable prospect of success, though that was not the test at present. Another factor was that, under the present Rules, and unlike in the employment tribunals, there was no provision whereby costs could be awarded if proceedings were misconceived, which was defined as having no reasonable prospect of success. The test in the Employment Appeal Tribunal remained whether the proceedings had been brought or conducted unreasonably. Having weighed the matter in the light of all those points, the appeal tribunal concluded that the present proceedings had not been brought or conducted unreasonably by the appellant, albeit without much hope of any success. Though it was pointed out on behalf of the appellant that no warning shot had been fired by the respondent, it would not be right for there to be some kind of condition before it could be said that a case had been brought unreasonably for there to have been a threat of costs. But it was feasible to put a statement in a respondent's answer to the effect that the appeal was entirely one of fact and the appeal tribunal had no jurisdiction. For the future those who had cases at risk of being found to be brought or continued without reasonable prospect of success would be at risk as to costs and should not feel comforted by the existence of a sift order, or even a preliminary hearing order, entitling them to go ahead.

Iron and Steel Trades Confederation v ASW Ltd; 20 July 2004; EAT/452/04
EAT: Burton J (President), Mr R N Straker and Mrs L Tinsley

EQUAL PAY

Four women employees claimed equality of pay with male employees engaged on equivalent work, who were paid the same hourly rate but received in addition a fixed bonus and an attendance allowance, which was paid so long as they turned up for work even if they did not complete their shift. An employment tribunal held that each applicant was entitled to comparity of pay with the male employee most advantageous to them for the purpose of the bonus element of his pay and, in addition, to a relevant comparator for the purpose of the attendance allowance element of his pay.

MITTING J, allowing an appeal by the employers, said that the employment tribunal had concluded that the bonus payments, being calculated on the number of hours worked, were, in effect, part of the standard rate of pay for basic hours, but that the attendance allowance, which only required the worker to turn up for work, was not calculated on an hourly rate and was the subject of a separate term. The following conclusions could be derived from *Hayward v Cammell Laird Shipbuilders Ltd* [1988] ICR 464. First, the tribunal had to compare a term of the woman's contract with a similar term of the man's contract, if there was one. It was impermissible to consider the whole of the contractual or other benefits which could be categorised as pay. Secondly, "term" meant "a distinct provision or part of the contract which has sufficient content to make it possible to compare it from the point of view of the benefits it confers with a similar provision or part in another contract". Thirdly, the terms of the individual contracts under consideration had to be analysed to discern which of them were separate and distinct terms or parts of the contract, or which of them made comparable provision for the same subject matter. Fourthly, to determine whether or not the provisions of an agreement constituted one or more than one term, it was necessary to examine their content. Fifthly, most contracts of employment contained mutual obligations: on the employee to attend for work, on the employer to make monetary payment in return. Sixthly, the provision for payment in many contracts would include an obligation to pay an hourly wage or monthly salary, but might also include, as in the present case, a fixed uplift, labelled by the parties as a bonus. As the employment tribunal had rightly held, the provision for a fixed uplift was not a separate and distinct term or part of the contract but part of the same term as that for the payment of the hourly rate. The question was how to define that term. It could be precisely defined as: "provision for monetary payment for the performance of the contract by employees during normal working hours." The question then was: what was the status of the attendance allowance? The appeal tribunal's view was that it did relate to the same subject matter as basic hourly pay and the bonus, and that it was an element of a distinct part of the contract and not itself a distinct part. It was part of the monetary payment for performance of the contract. The fact that it could on occasion be paid to a man who left soon after he attended work did not make it any less so, because attendance at work and performance of some work was the obligation in respect of which it, like the basic hourly pay and the bonus, was paid. All monetary payments received by the male comparators for normal working hours should be aggregated and divided by the number of hours in the working week, to give an hourly rate. That hourly rate should be compared with the woman's rate; if it was greater, the woman's hourly rate should be increased to eliminate the difference. The tribunal had

rred in deciding that the provision for the attendance allowance was a separate term and not part of a ngle term.

Redcar and Cleveland Borough Council v Degnan; 27 July 2004; EAT 321/04
EAT: Mitting J, Miss G Mills and Mr P A L Parker

NFAIR DISMISSAL

An employment tribunal upheld an applicant employee's complaint of unfair dismissal, holding that smissal was a disproportionate sanction and outside the range of reasonable responses, in circumstances here two other employees also involved in the events which had led to the applicant's dismissal had erely been reprimanded or not disciplined at all.

MITTING J, allowing an appeal by the employers and remitting the matter to the employment ibunal, said that the employment tribunal had not referred to the guidance of the Employment Appeal ribunal in *Hadjioannou v Coral Casinos Ltd* [1981] IRLR 352 as to the approach to be taken when mparing action taken against one employee with that taken against a dismissed employee. That pproach was considered by the Court of Appeal in *Paul v East Surrey District Health Authority* [1995] RLR 305, where the court stated that it would be wise for any employment tribunal considering such a tuation to follow it. The guidance was: "[counsel] has submitted that an argument by a dismissed mployee based upon disparity can only be relevant in limited circumstances. He suggests that, in broad rms, there are only three sets of circumstances in which such an argument may be relevant to ecision . . . Firstly, it may be relevant if there is evidence that employees have been led by an employer to elieve that certain categories of conduct will be either overlooked, or at least not dealt with by the nction of dismissal. Secondly, there may be cases in which evidence about decisions made in relation to her cases supports an inference that the purported reason stated by the employers is not the real or enuine reason for dismissal . . . Thirdly, [counsel] concedes that evidence as to decisions made by an mployer in truly parallel circumstances may be sufficient to support an argument, in a particular case, that was not reasonable on the part of the employer to visit the particular employee's conduct with the enalty of dismissal and that some lesser penalty would have been appropriate in the circumstances. We ccept that analysis . . . We should add, however . . . that [employment] tribunals would be wise to rutinise arguments based upon disparity with particular care . . . there will not be many cases in which e evidence supports the proposition that there are other cases which are truly similar, or sufficiently milar, to afford an adequate basis for the argument." The employment tribunal should have expressly minded itself of that valuable guidance. Clearly the first and second circumstances did not arise in the resent case but the third did. The tribunal did not expressly ask itself whether the other employee's osition was truly comparable with that of the applicant. Had it asked itself the question posed in the idance it would have done so. Because the tribunal had not posed and expressly answered the question, s decision was legally flawed.

Hillcrest Care Ltd v Morrison; 21 July 2004; EAT/299/04
EAT: Mitting J, Mr M Clancy and Mrs A Gallico

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